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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN NOBLE, an individual, and CEDAR RIDGE HOMES, INC., an Idaho corporation,

Plaintiffs/Petitioners/Appellants,

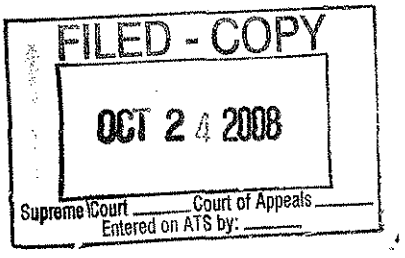
vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS, ELMER R. (RICK) CURRIE, W. TODD TONDEE, and RICHARD A. PIAZZA, COMMISSIONERS, in their official capacities,

Defendants/Respondents.

Supreme Court Docket
No. 35201

Kootenai County Civil
Case No. CV-07-5180



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BRIEF OF RESPONDENTS

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

THE HONORABLE JOHN P. LUSTER, DISTRICT JUDGE, PRESIDING

Mischelle R. Fulgham
Paul R. Harrington
LUKINS & ANNIS, P.S.
250 Northwest Boulevard, Suite 102
Coeur d'Alene, ID 83814
Attorneys for Appellants

Patrick M. Braden
KOOTENAI COUNTY
451 N. Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Attorney for Respondents

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case concerns the denial of an application for preliminary approval of a proposed subdivision known as "Cedar Creek Ranch Estates" by Respondent Kootenai County (hereinafter referred to as "the County").

B. Concise Statement of Facts

The Appellants, John Noble and Cedar Ridge Homes Inc. (hereinafter referred to as "CRH") are the owners of real property in unincorporated Kootenai County, Idaho which is located on the south side of East Ohio Match Road at the southeast corner of the intersection with North Rimrock Road (hereinafter referred to as "the property"). Agency R. p. 113-27.[1] The property is described as a portion of Sections 20 and 21, Township 52 North, Range 3 West Boise Meridian, Kootenai County, Idaho. Agency R. p. 140-41, 271-72. It is located in the Rural zone, where the minimum lot size is five (5) acres. Agency R. p. 425. The surrounding land use in the area consists of single family dwellings with accessory buildings and undeveloped lots on large parcels. *Id.*

Water originally was proposed to be provided from individual wells, but CRH was later able to secure water service from the Garwood Water Cooperative. Agency R. p. 136, 283. Sewage disposal was proposed to be provided by individual septic systems and drainfields. Agency R. p. 136. Access to each lot was to be provided from Ohio

[1] For the sake of clarity, this brief will use the same references to the records and transcripts before the Board ("Agency R." and "Agency Tr.") and the District Court (R. and Tr.), respectively. See Brief of Appellants at 2 n.1.

Match Road via a private road to be constructed to highway district standards, through two common driveways connecting to that road, and through a third common driveway connecting directly to Rimrock Road. Agency R. p. 58-61.

A wetlands delineation found the presence of wetlands of what has been termed the "meadow" portion of the property. Agency R. p. 42-44, 59, 131-33. The U.S. Army Corps of Engineers determined that these wetlands were non-jurisdictional. Agency R. p. 134-35.

Additional relevant facts are contained in the section entitled "Course of Proceedings" below, and in Part IV of this brief, entitled "Argument."

C. Course of Proceedings

CRH filed an application for a major subdivision on February 8, 2006, requesting to create twenty (20) lots, ranging from five (5) to ten (10) acres each, on three parcels totaling 152.440 acres. Agency R. p. 81, 136, 140-41. The application was assigned Case No. S-842P-06. The application then proceeded through a period for preliminary processing, agency comment, and public comment.

On January 18, 2007, a public hearing was held before Kootenai County Hearing Examiner Rebecca Zanetti. Agency R. p. 418-20; Agency Tr. p. 1-33. Several neighboring property owners testified in opposition to the application citing possible flooding problems of the applicable land, increased traffic problems and a general desire to see the land stay undeveloped. Agency R. p. 418-19; Agency Tr. p. 17-29. Notwithstanding this testimony, however, Ms. Zanetti's January 30, 2007 report

recommended approval of the application with several proposed conditions. Agency R. p. 337-46.

At their deliberations on February 15, 2007, the Kootenai County Board of Commissioners (hereinafter referred to as the "Board") granted a request for a public hearing made by Wallace Hirt, who had testified in opposition to the request at the hearing before Ms. Zanetti. Agency R. p. 471-73; Agency Tr. p. 35-36. On April 12, 2007, a public hearing was held before the Board. Agency R. p. 468-70; Agency Tr. p. 38-79.

The chief concern expressed at this hearing, and previously at the public hearing before Ms. Zanetti, had to do with the large area within the proposed subdivision which experiences flooding on an periodic basis. Agency R. p. 418-19, 468-69; Agency Tr. p. 2-29, 39-77. CRH's representatives and neighbors testifying in opposition to the request each addressed this issue, as well as other associated issues. *Id.*

At the public hearing before the Board, CRH's representatives explained the wetland and flood issues associated with the "meadow" area of the proposed subdivision. Agency R. p. 468; Agency Tr. p. 45-64. They testified that the proposed subdivision would include a zone within the meadow area where building would be prohibited. Agency R. p. 468; Agency Tr. p. 47-48, 52. They further testified that the proposed subdivision would comply with the requirements of other agencies with jurisdiction, such as the Idaho Department of Environmental Quality (DEQ) and the Panhandle Health District (PHD). Agency Tr. p. 46-47, 53-54, 61-62.

During public testimony, Hirt stated that the meadow frequently floods, and submitted photographs in support of his testimony. Agency R. p. 446-48, 469; Agency Tr. p. 68-70. Another neighbor, Jeremiah Leeke, also submitted photographs of the meadow area during his testimony. Agency R. p. 452-54, 469; Agency Tr. p. 70-72. The photographs showed that flooding has occurred to varying degrees in the meadow area. Agency R. p. 446-48, 452-54; Agency Tr. p. 71. Hirt, Leeke, and other adjacent property owners also expressed concerns about the potential for their domestic water wells to be adversely impacted by the proposed drainfields. Agency R. p. 469; Agency Tr. p. 65-73.

In rebuttal, CRH's representatives reiterated that their proposed drainfield locations had been approved by PHD, which would be the appropriate authority to ensure that the neighbors' well water would not be fouled by the proposed subdivision's sewage disposal systems. Agency R. p. 469; Agency Tr. p. 74-77.

At the conclusion of the April 12, 2007 public hearing, the Board left the public hearing open in order to allow CRH to submit information regarding the placement and size of all building envelopes within the proposed subdivision, and for the purpose of conducting a site visit. Agency R. p. 469; Agency Tr. p. 78-79.

Because the date and time of the site visit had not been determined at the April 12, 2007 public hearing, a Notice of Site Visit was issued and posted on or near the property. Notices were also mailed to adjacent property owners within 300 feet of the site on April 20, 2007, and a notice was published in the *Coeur d'Alene Press* on April

24, 2007. Agency R. p. 11-24c, 150-56, 424. The Board received information submitted by CRH regarding the placement and size of the building envelopes within each lot, no-build zones, and locations of drainfields, and conducted a site visit on May 22, 2007. Agency R. p. 6-28; Agency Tr. p. 81-110.

At their deliberations on May 31, 2007, the Board discussed the evidence in the record and their observations during the site visit. Agency Tr. p. 113-23. The Board then voted unanimously to deny this request. Agency R. p. 438-40; Agency Tr. p. 123-25. On June 21, 2007, the Board approved the signing of the written order denying the request. Agency R. p. 422-35; Agency Tr. p. 128-29.

On July 19, 2007, CRH timely filed a Petition for Judicial Review of the Board's decision. R. p. 8-34. CRH filed a Motion to Augment the Record on August 23, 2007 order for the District Court to consider an affidavit executed by CRH's project engineer, Russ Helgeson. R. p. 39-58. The District Court granted this motion by order dated October 18, 2007. R. p. 78-79. On January 3, 2008, after hearing oral argument on the Petition for Judicial Review, the District Court ruled in favor of the County on the issues pertaining to the site visit from the bench, but reserved ruling on the issues pertaining to the application of the Kootenai County Flood Damage Prevention Ordinance, Ordinance No. 311, as amended by Ordinance 333 (hereinafter referred to as the "Flood Ordinance")[2] to this case. Tr. p. 53-63. The District Court entered a Memorandum

[2] The copy of the Flood Ordinance provided by CRH in Exhibit 1 to the Brief of Appellants is a true and correct reproduction of the relevant provisions of the Flood Ordinance in effect at the time of application.

Opinion and Order in re: Petition for Judicial Review on February 26, 2008, in which it ruled in favor of the County on the issues pertaining to the application of the Flood Ordinance to this request. R. p. 181-94. On April 7, 2008, CRH timely filed a Notice of Appeal of the District Court decision to this Court. R. p. 195-99.

II. ADDITIONAL ISSUES ON APPEAL

The County does not assert any issues on appeal in addition to those set forth in the Brief of Appellants.

III. STANDARD OF REVIEW

The standard of review of a decision of a local governing board pursuant to the Local Land Use Planning Act, Title 67, Chapter 65, Idaho Code (LLUPA), on appeal from a decision of the District Court on a petition for judicial review of the local entity's decision, has been very recently set forth by this Court as follows:

> The Local Land Use Planning Act (LLUPA) allows an affected person to seek judicial review of an approval or denial of a land use application, as provided for in chapter 52, title 67, Idaho Code, the Idaho Administrative Procedure Act (IDAPA). For purposes of judicial review of LLUPA decisions, a local agency making land use decisions, such as the Board, is treated as a government agency under IDAPA.
>
> In an appeal from district court, where the court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court's decision. As to the weight of the evidence on questions of fact, this Court will not substitute its judgment for that of the zoning agency. The Court defers to the agency's findings of fact unless they are clearly erroneous and the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by evidence in the record. Planning and zoning decisions are

> entitled to a strong presumption of validity, including the agency's application and interpretation of its own zoning ordinances.
>
> The Court shall affirm the zoning agency's action unless the Court finds that the agency's findings, inferences, conclusions or decisions are: (a) in excess of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. The party attacking the agency's action must first illustrate that it erred in the manner specified therein and must then show that a substantial right of the party has been prejudiced.

Neighbors for a Healthy Gold Fork v. Valley County, 145 Idaho 121, 126, 176 P.3d 126, 131 (2007) (citations omitted).

IV. ARGUMENT

A. The District Court correctly held that the decision of the Kootenai County Board of Commissioners in Case No. S-842P-06 was not arbitrary, capricious, or an abuse of discretion, and was not made in violation of applicable provisions of county ordinance.

CRH contends that the District Court erred in finding that the decision of the Board in Case No. S-842P-06 was not arbitrary, capricious, or an abuse of discretion because the Board allegedly misapplied the provisions of the Flood Ordinance in denying its subdivision proposal. This argument must fail, however, because the Board's decision properly considered the findings mandated for preliminary subdivision approval under the Kootenai County Subdivision Ordinance in effect at that time, Ordinance No. 344 (hereinafter referred to as the "Subdivision Ordinance")[3]. To the

[3] Pursuant to I.A.R. 35(f), a true and correct copy of Ordinance No. 344 is attached as Appendix "A" to this brief.

extent the Flood Ordinance may be applicable to this case, the Board did not violate or misapply any of its provisions.

1. The Board's decision properly considered the findings mandated for preliminary subdivision approval under the Subdivision Ordinance.

This Court has previously defined "substantial evidence" as "relevant evidence which a reasonable mind might accept to support a conclusion." *Lamar Corp v. City of Twin Falls*, 133 Idaho 36, 42-43, 981 P.2d 1146, 1152-53 (1999). It is "less than a preponderance of evidence, but more than a mere scintilla." *Cowan v. Fremont County*, 143 Idaho 501, 517, 148 P.3d 1247, 1263 (2006). Substantial evidence "need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder." *Id.* A strong presumption of validity favors the actions of zoning authorities when applying and interpreting their own zoning ordinances. *Lamar*, 133 Idaho at 39, 981 P.2d at 1149.

A decision of a governing board will be considered "arbitrary and capricious," and an abuse of the governing board's discretion, only if it was made "without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). As long as the governing board has been found to have acted within the bounds of its discretion, however, a reviewing court cannot substitute its judgment for that of the governing board. *Id.* Where reasonable minds may differ, "an action is

not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Enterprise, Inc. v. City of Nampa*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975).

Here, CRH's arguments imply that the only legal standards which the Board considered in making its decision to deny its request for preliminary approval of the proposed "Cedar Creek Ranch Estates" subdivision are found in the Flood Ordinance. The Flood Ordinance, however, was not the only legal standard considered; in fact it was not even the primary standard by which the proposal was evaluated. The standards by which a major subdivision application are to be evaluated, and the findings which must be made in order to give preliminary approval to such applications, are contained in section 2.01 of the Subdivision Ordinance. This section reads, in pertinent part, as follows:

> The following factors are to be considered when evaluating an application, based on the information presented by the Applicant:
>
> - The Applicant provided adequate information to determine compliance with requirements.
> - The plan and supplemental pages meet the requirements of Table 2-1.
> - The subdivision proposal meets (or is capable of meeting) the requirements of this Ordinance.
> - The plan, project and proposed lots are capable of meeting all other applicable County ordinances without variances (e.g. the Zoning, Site Disturbance, Road Naming, Area of City Impact and Flood ordinances).
> - The plan, project and proposed lots are capable of meeting the requirements of other agencies.

- The proposal will contribute to orderly development of the area. Proposed uses, design and density are compatible with existing homes, businesses, neighborhoods, and with the natural characteristics of the area. The subdivision will create lots of reasonable utility and livability, which are capable of being built upon without imposing an unreasonable burden on future owners. Areas not suited for development are designated as open space.
- Where appropriate, the proposed subdivision will have adequate open space for recreation, wildlife, agriculture, or timber production. Road construction and disturbance of the terrain, vegetation and drainageways will be minimized and will not result in soil erosion. The design will adequately address site constraints or hazards and will adequately mitigate any negative environmental, social or economic impacts.
- Services and facilities such as schools, electricity, water, sewer, stormwater management, garbage disposal, EMS, police and fire protection are feasible, available and adequate. The proposal includes on and off site improvements, and if necessary payments, to mitigate the impacts of the subdivision so that it does not compromise the quality, or increase the cost, of public services. Mitigation actions or fees must be commensurate with the impacts of the subdivision, and fees must be authorized by law.
- Proposed roads, sidewalks and trails establish or adequately contribute to a transportation system for vehicles, bicycles and pedestrians that is safe, efficient and that minimizes traffic congestion.
- The proposal is not anticipated to result in significant degradation of surface or ground water quality as determined by DEQ.
- Public notice and the processing of this application met the requirements set forth in this Ordinance, County adopted hearing procedures and Idaho Code.

Ordinance No. 344 § 2.01(C)(1)(k)-(ℓ); Appendix "A" at 19-20. These criteria are also contained in section 3.01 of the Board's decision. Agency R. p. 429-30.

The conclusions of law contained in the Board's decision simply indicate that the Board could only make some, but not all, of these mandatory findings on the evidence

before it. These conclusions are supported by substantial evidence in the record; namely, the testimony of neighbors who were longtime residents of the surrounding area and the photographs submitted by opponents to the application which depicted flooding in the "meadow" area. *See* Agency R. p. 301-35, 382-406, 446-48; Agency Tr. p. 17-29, 65-74.

The findings based on this evidence led to the conclusions that the application failed to meet certain requirements of the Subdivision Ordinance. Specifically, the Board found that 1) the proposal failed to adequately address existing site constraints and/or special hazards; 2) it was unable to find that the proposed lots would be of reasonable utility and livability, capable of being built upon without imposing an unreasonable burden on future owners; 3) it was unable to find that all of the proposed drainfield locations would be of reasonable operational utility to the future owners, and will not negatively effect area water resources; 4) it was unable to find that the proposed location of the roadway which was to traverse the "meadow" would be of reasonable operational utility to the future owners; and 5) it was unable to determine whether the proposed road design would require mitigation of negative environmental impacts to the flood hazard area, or to positively determine how its design or construction is the minimum necessary at this site. Agency R. p. 431-32. All of these conclusions were based on standards contained in the Subdivision Ordinance, as quoted above, and were based on substantial evidence in the record.

2. The District Court correctly held that, to the extent the Flood Ordinance may be applicable to this case, the Board did not violate or misapply any of its provisions.

It is clear that the Board's conclusion that the CRH application did not meet the requirements of the Subdivision Ordinance was based on concerns related to flooding. All parties were aware that the "meadow" area was prone to frequent flooding. CRH's engineer designated a portion of this property that was acknowledged to be prone to flooding as a "no-build zone." Agency R. p. 375-81, 468; Agency Tr. p. 45-64. On the other hand, testimony, written statements, and photographs submitted by opponents of the application indicated that the meadow flooded to a greater degree than depicted by CRH. Agency R. p. 301-35, 382-406, 446-48; Agency Tr. p. 65-74. Thus, the evidence in the record pertaining to this issue led to the Board's finding that it did not have accurate base flood elevation (BFE) information before it, which in turn led to the conclusion that several findings which are mandatory for preliminary subdivision approval under the Subdivision Ordinance could not be made in this instance. Agency R. p. 425-27, 431-32.

CRH, however, contends that these findings were based on a misapplication of the allegedly relevant provisions of the Flood Ordinance. The Flood Ordinance defines "area of special flood hazard" as follows:

> AREA OF SPECIAL FLOOD HAZARD: This is the 100-year floodplain subject to a one percent (1%) or greater chance of flooding any given year. The boundaries of the area of special flood hazard consist of the greater of the following: areas designated as zone A on the flood insurance rate map (FIRM), the greatest flood of record or best available

> data as provided by FEMA [the Federal Emergency Management Agency] or another authoritative source.

Ordinance No. 311 § 2.0. Section 4.2 of the Flood Ordinance states that:

> The administrator shall ... make interpretations, where needed, as to exact location of the boundaries of the areas of special flood hazards and floodways (for example, where there appears to be a conflict between a mapped boundary and actual field conditions), and shall consider new information provided by FEMA or other authoritative sources. The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretations."

Ordinance No. 311 § 4.2(C) (emphasis added). The term "administrator" is defined in the Flood Ordinance as "[t]he person designated by the board of county commissioners as being responsible for processing and coordinating this chapter. The term can apply to the planning director or the planning director's designee." Ordinance No. 311 § 2.0.[4]

Here, at no time did CRH ever request that the planning director or designee make a determination as to the base flood elevation for the "meadow" area. Therefore, the planning director or designee was never called upon to make an interpretation as to the location of any floodway or area of special flood hazard. In fact, as the District Court correctly pointed out, the Flood Ordinance places this burden on the applicant:

> Where base flood elevation data has not been provided or is not available from another authoritative source, it shall be generated by the developer's

[4] CRH claims that the definitions of "area of special flood hazard" and "flood insurance rate map (FIRM)" in section 2.0 of the Flood Ordinance are "impossible to reconcile," as the former definition appears to be broader than the latter, while the latter purports to incorporate the former into its definition. *See* Brief of Appellants at 17 n.9. The broader definition of "area of special flood hazard," however, merely recognizes the reality that new areas of special flood hazard not yet reflected on the FIRM could be determined via examination of data from FEMA or other authoritative sources – or, absent such data, by the developer's engineer under section 3.2(F)(4) of the Flood Ordinance. Such a determination would occur via the process set forth in section 4.2(C) of the Flood Ordinance.

engineer for projects which contain at least 5 lots or 5 acres (whichever is less).

Ordinance No. 311 § 3.2(F)(4) (emphasis added); *see also* R. p. 186. The District Court also correctly pointed out that this information could then be used by the planning director or designee, at the applicant's request, to determine the "exact location of the boundaries of the areas of special flood hazards and floodways."

It is also necessary to point out that there was much discussion at the public hearings before both the hearing examiner and the Board as to the extent of flooding in the "meadow area" of the site, and the mitigation measures proposed. The Board, in particular, had concerns as to whether the land within the building envelopes in the lots abutting Ohio Match Road would be subject to periodic flooding or would constitute wetlands during at least part of the year, particularly in light of the photographs of the site submitted during the course of proceedings. Agency Tr. p. 114-17. The Board also expressed concerns as to whether the proposed private road and common driveways would exacerbate the flooding which currently exists on the site, and as to the likelihood that the proposed sewage disposal system could foul neighboring water wells downstream. Agency Tr. p. 57-59, 64, 117-20.

CRH had ample opportunity at every stage of these proceedings to rebut that evidence and show that these building envelopes would not be subject to flooding and that the risk of any adverse effects of water within these proposed lots, or on neighboring wells, would be mitigated. In fact, Petitioners' representatives did fairly

extensively address these issues in their presentation in chief and in rebuttal. Agency Tr. p. 45-64, 74-77. The Board simply decided that CRH failed to adequately show that those building envelopes would not be subject to periodic flooding, or that the potential environmental risks inherent in this project would be mitigated. Agency Tr. p. 114-23. Thus, the application of the Flood Ordinance, to the extent it applies to this case, was based on a proper reading and application of the relevant provisions thereof and was based on substantial, though in some ways conflicting, evidence.

In addition, as the District Court correctly pointed out, although the County denied the CRH proposal, it did not completely "slam the door" on future approval of a subdivision on that property. Instead, as required under Idaho Code § 67-6519, it identified several actions CRH could take to gain preliminary approval of its proposed subdivision. These actions the Board identified are as follows:

1. Base flood elevation information must be provided in order to evaluate whether proposed building envelopes are located outside the area of special flood hazard.
2. Base flood elevation information must be provided in order to access the viability of proposed drain field envelopes.
3. Design internal roadways/access that minimizes the impacts to sensitive and/or special hazard areas.
4. Design internal roadways/access to a standard acceptable to road district for design and maintenance requirements.
5. Re-apply as modified above, or, re-apply as a conservation design subdivision, leaving the "meadow" and/or the "flood hazard area" as open space with a conservation easement.

Agency R. p. 432. These are reasonably related to the Board's findings of fact and conclusions of law, and were intended to identify a remedy to the defects the Board

found in this application which led to its denial. The identification of a BFE for the property under section 3.2 of the Flood Ordinance could then lead to a determination by the planning director or designee as to the existence of any areas of special flood hazard based on data obtained through FEMA or other authoritative sources under section 4.2 of the Flood Ordinance – the way the process is supposed to work.

3. No substantial rights were prejudiced as a result of the Board's application of the Flood Ordinance to this case.

CRH further contends that the County misapplied the Flood Ordinance by stating in section 2.09 of its Findings of Fact that "[w]ith public testimony and photographs, the area of this proposal called the 'meadow' appears to be an area of special flood hazard." Agency R. p. 425-26. This finding was based on "other authoritative sources," namely, testimony and written statements of neighbors who regularly observed flooding on the site and in other surrounding areas, some of whom had resided in the area for thirty (30) or more years, along with photographs of flooding occurring on the property. *See* Agency R. p. 425-26; Agency Tr. p. 17-29, 65-74.

The Flood Ordinance prohibits the construction of residential structures on lots lawfully created and recorded after September 14, 1999 within those areas of Kootenai County designated as "areas of special flood hazard." Ordinance No. 311 § 3.2(A). The Board's analysis did conclude by stating that "the Board has great concern that, if approved, the health, safety and general welfare of the public will be jeopardized by

platting lots, developing roadway and access, constructing drain fields and approving building envelopes within an area of special flood hazard." Agency R. p. 431.

The Board's conclusions of law, however, did not specifically find that the property was located within an area of special flood hazard; instead, they merely found that on the evidence before it, much of the property "appeared" to be within an area of special flood hazard. *See* Agency R. p. 426. To make that determination, the Board would need information regarding BFE which was lacking in the record. *See id.* Perhaps more importantly, the Board did not state that building of residential structures on the proposed lots along Ohio Match Road would be legally prohibited on the basis of location within an area of special flood hazard under section 3.2(A) of the Flood Ordinance. *See* Agency R. p. 431-32. Instead, these conclusions stop short of such a result, as they were merely based on the determination that the issues regarding mitigation of the effects of periodic flooding in the "meadow" area were not satisfactorily addressed by CRH, particularly with respect to the proposed lots along Ohio Match Road. *See id.* In its brief, CRH relegated this very important distinction to a footnote. *See* Brief of Appellants at 19 n.10.

Nevertheless, CRH's arguments in this regard are academic. In addition, CRH was provided ample opportunity to respond to the information which formed the basis for this determination, and in fact did avail themselves of that opportunity. Accordingly, no violation of any substantive or procedural provisions of the Flood Ordinance

occurred, and no substantial rights of CRH were adversely affected by the finding that the "meadow" area of the site "appeared" to be an area of special flood hazard.

B. The District Court correctly held that the decision of the Kootenai County Board of Commissioners in Case No. S-842P-06 was not made in violation of applicable provisions of the Idaho Open Meetings Law, was not made upon unlawful procedure, and did not prejudice any substantial rights of CRH.

CRH also contends that the District Court erred in finding that the decision of the Board in Case No. S-842P-06 was not made in violation of applicable provisions of the Idaho Open Meetings Law, Idaho Code § 67-2340 *et seq.* (hereinafter referred to as the "Open Meetings Law"), and that it was not made upon unlawful procedure. CRH instead alleges that the manner in which the Board's site visit to the property was allegedly conducted violated the Open Meetings Law, and that it was conducted in violation of CRH's due process rights.

These arguments must fail, however, because the site visit was not conducted in violation of the Open Meetings Law, and was not conducted in violation of any due process right previously recognized by this Court with respect to the viewing of property by a quasi-judicial body. In addition, this appeal presents this Court with the opportunity to harmonize its prior decisions regarding viewings made by judges or juries with those concerning viewings made by quasi-judicial bodies in the context of land use applications.

1. The District Court correctly held that the site visit to the property was not conducted in violation of the Idaho Open Meetings Law.

The Open Meetings Law mandates that "all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." Idaho Code § 67-2342(1). The Board is a "governing body" of a "public agency" as defined in Idaho Code § 67-2341. A "meeting" is defined as "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter," which can occur as a "regular meeting" or a "special meeting." Idaho Code § 67-2341(6). A "decision" is defined, in pertinent part, as "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present...." Idaho Code § 67-2341(1). A "deliberation" is "the receipt or exchange of information or opinion relating to a decision" other than any "informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision." Idaho Code § 67-2341(2).

CRH contends that the District Court erred in finding that the site visit made by the Board prior to its decision in this case was conducted in violation of the provisions of

the Open Meetings Law.[5] The County does acknowledge that the site visit at issue constituted a "meeting" (specifically, a "special meeting") of a "governing body" of a "public agency" subject to the requirements of the Open Meetings Law. In addition, at the conclusion of the April 12, 2007 public hearing, the Board left the public hearing open for two specific purposes. Agency Tr. p. 78-79. The purposes for leaving the public hearing open were: 1) to leave the record open in order to receive additional information from CRH regarding the location of drainfields, no-build zones, and building envelopes in the proposed subdivision, and 2) to allow the Board's observations as to the characteristics of the site made during the course of the site visit to be included in the record of proceedings. *Id.* The record was not left open for the purpose of accepting any additional testimony from any party, whether from CRH's representatives or from opponents.

The site visit was properly noticed according to Idaho law and county ordinance, was open to the public, and CRH's representatives had in fact gathered at the property for the site visit. Agency R. p. 6-28, 150-56, 424; R. at 40-41. While the Board and

[5] In its brief, CRH also contends that the site visit in question failed to comply with the requirements of Idaho Code § 67-5242. *See* Brief of Appellants at 26-27, 30. The provisions of the Idaho Administrative Procedures Act (IDAPA) regarding contested cases only apply to cases before a state agency, however, and do not apply to quasi-judicial proceedings conducted by cities or counties under LLUPA. The only provisions of IDAPA which apply to decisions made under LLUPA and local ordinances enacted pursuant to LLUPA's authority are those pertaining to judicial review of such decisions. *See* Idaho Code § 67-5201(2) (definition of "agency"); Idaho Code § 67-5240 (defining a "contested case" by stating that "[a] proceeding by an agency ... that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter...") (emphasis added); and Idaho Code § 67-6521(d) (stating that "[a]n affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code") (emphasis added).

County staff did initially drive past the persons who had gathered at the site, these persons certainly had the opportunity to follow the Board and staff to the area in which the Board had decided to stop and make observations, even though they would not have been allowed to talk to the commissioners themselves. *See* R. p. 40-41. Mr. Helgeson did indicate that he was able to observe the Board and staff on two different parts of the property. R. p. 41-42.

Mr. Helgeson and the other representatives of CRH certainly could have followed the Board and staff to that area (though not to the point of being able to discuss the matter with the Board) during the course of the site visit if he had chosen to do so. CRH should not be heard to complain that they were not afforded the opportunity to observe the Board and listen to the comments of its members when it was the choice of CRH's gathered representatives not to do so. In addition, as the District Court observed, the locations where a governing board elects to view a property which is the subject of a land use application should not be "dictated by what one side or the other felt should be observed or should not be observed." Tr. p. 58-59. Therefore, for these reasons, the Board did not violate the applicable provisions of the Open Meetings Law.

2. The District Court correctly held that the site visit was not conducted in violation of any right to due process previously recognized by this Court, and no substantial rights of CRH were prejudiced as a result.

In *Comer v. Twin Falls County*, 130 Idaho 433, 942 P.2d 557 (1997), the Idaho Supreme Court found that a site visit was procedurally defective when no notice of the site visit was given to interested parties, thereby depriving those parties of the

opportunity to be present. *Comer*, 130 Idaho at 439, 942 P.2d at 563. The Court stated that "[b]ecause none of the parties was present during the viewing, and because no record was made of the viewing, the parties have no way of knowing if the correct parcels of property were examined by members of the Board." *Id.* However, the Court limited its holding to a requirement that whenever "a local zoning body ... views a parcel of property in question, it must provide notice and the opportunity to be present to the parties." *Id.* (emphasis added). It did not go so far as to require that parties be afforded the opportunity to be heard at a site visit. *See id.*

Here, the site visit was properly noticed according to Idaho law and county ordinance, and CRH has not argued that such notice was defective. Instead, CRH focuses on the allegation that it was deprived from participating in the site visit in a meaningful way for two reasons: first, because it was allegedly denied the opportunity to speak to the Board or County staff, and second, because it was allegedly denied the ability to be in sufficient proximity to the Board as to allow CRH representatives to hear what the Board members were saying. *See* Brief of Appellants at 35-37. Each of these arguments will be addressed in turn.

CRH's engineer, Russ Helgeson, alleged in an affidavit[6] that he was denied the opportunity to speak to the Board regarding the property. R. p. 40-42. The opening

[6] Mr. Helgeson's affidavit was the subject of a motion to augment the record brought by CRH in support of the petition for judicial review before the District Court, which the District Court granted over the County's objection on October 18, 2007. *See* R. p. 39-79. In this appeal, the County is not contesting the augmentation of the record with this affidavit.

brief submitted by CRH in support of its petition for judicial review before the District Court conceded that it was not contending that its representatives had the right to speak to the Board directly during the course of the site visit. R. p. 94 n.1. Nevertheless, in this appeal, CRH appears to be arguing, once again, that it should have the ability to do so. *See* Brief of Appellants at 30-32, 35-37.

The reason for this argument appears to be that Mr. Helgeson should have had the opportunity to explain the markings on a map of the property provided by CRH to County staff prior to the site visit, and to correlate those markings to flags set at various points on the property. CRH has contended that the transcript of the site visit indicates that the Board and County staff were confused as to the placement of the flags and how they correlated with those markings. It is apparent from the transcript of the visit, however, that with assistance from County staff (in particular, Jay Lockhart), the Board was able to correlate the flags placed on the property to the markings on the map. Agency Tr. p. 87-96. On this issue, the District Court stated that:

> They [the Board and accompanying County staff] had numerous maps. They had plenty of information in front of them from which they could certainly understand the proximity of the meadows, the wetlands, the building envelopes, and the general location where the roads would be constructed, and so forth.
>
> Again, the photos and the maps are replete within the file, and I don't think that the record establishes that somehow they confused a wetland or flood plain or meadow with a building envelope location. That simply is not supported in the record.

Tr. p. 58. The District Court further pointed out that "the site visit was not an opportunity to take further evidence or allow for parties to provide explanation of locations or other observable objects at the scene...." *Id.* This reasoning is consistent with this Court's pronouncement in *Comer* that due process in the context of a viewing by a quasi-judicial governing board or hearing body encompasses notice and the opportunity to be present, rather than an opportunity to be heard. *See Comer*, 130 Idaho at 439, 942 P.2d at 563.

CRH also complains that its representatives were denied the ability to be in sufficient proximity to the Board as to allow CRH representatives to hear what the Board members were saying. As discussed above, CRH's representatives cannot complain about a lack of opportunity to be present at the site visit when they chose not to follow the Board and staff to the area in which the Board had decided to stop and make observations. In addition, the actions of County staff in keeping members of the public separated from the Board were merely to ensure that the Board received no additional testimony from anyone, whether from a CRH representative or an opponent. *See* Agency Tr. p. 106.

Finally, the manner in which the site visit was conducted did not prejudice any substantial rights of CRH. This Court has very recently stated that viewings of property cannot themselves constitute evidence on which a decision can be based. *Akers v. Mortensen*, ___ Idaho ___, ___ P.3d ___, 2008 WL 2266993, at *4 (Docket Nos. 33587

and 33694, June 4, 2008) (considering viewing of property by a district judge).[7] Rather, such observations are "only useful to evaluate and apply the evidence submitted" at a public hearing. *Id.* If the principles set forth in *Akers* are to be applied in this context (and they should, for reasons to be discussed below), it would follow that any statements made by the Board would be in the form of deliberations, rather than testimony which an applicant would properly have the opportunity to rebut.

As the District Court pointed out, "[t]here's no indication in the record that the county commissioners had, in fact, examined the wrong property, [or] had gone to the wrong location." Tr. p. 57. CRH has not argued that the Board viewed the wrong property, either before the District Court or this Court. This is the only concern that this Court specifically identified in *Comer*, when it recognized the right to the opportunity to be present at a site visit. *Comer*, 130 Idaho at 439, 942 P.2d at 563.

3. The Court should use this occasion to clarify its prior decisions regarding site visits conducted by quasi-judicial bodies in light of its recent decision in *Akers v. Mortensen*.

In *Akers*, this Court reviewed its prior decisions since 1918 concerning viewings by juries during the course of trials, and applied those decisions to viewings by a judge during the course of a trial to the district court without a jury. *See Akers*, 2008 WL 2266993, at *4. In that case, this Court made the following observations regarding viewings:

[7] For the convenience of the Court and counsel, and pursuant to I.A.R. 35(f), a copy of the Westlaw® version of *Akers* is attached as Appendix "B" to this brief.

> It is well established in Idaho that the knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial and that a view of the premises "is not of itself evidence upon which a verdict may be based." ...
>
> The purpose of the statute is not to permit the taking of evidence out of court, but simply to permit the jury to view the place where the transaction is shown to have occurred, in order that they may the better understand the evidence which has been introduced. ...
>
> Although these cases involve a viewing of the property by a jury, for purposes of appellate review, there is no analytical difference between a jury view and a court view. The policy underlying this rule of law is clear: the record must reflect the evidence upon which the finder of fact made its decision. This Court is simply unable to evaluate the basis of factual determinations made upon the basis of a view.

Id. (citations omitted). The Court then summed up by stating that "an inspection of the premises is only useful to evaluate and apply the evidence submitted at trial." *Id.*

In the same manner as the *Akers* Court found that there is no analytical difference between jury views and a view by a judge acting as the trier of fact, this Court should also find that there is no analytical difference between such views and viewings conducted by governing boards or hearing bodies acting as in a quasi-judicial capacity. *See Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 209, 159 P.3d 840, 846 (2007) ("When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge"). Accordingly, the Court should find that the site visit by the Board in this case "is not of itself evidence upon which a [decision] may be based," but instead merely allows the Board to view the place where the proposed subdivision is to be located, "in order

that [the Board] may the better understand the evidence which has been introduced," and is "only useful to evaluate and apply the evidence submitted" at the public hearings held on the matter. *See Akers*, 2008 WL 2266993, at *4.

Applying *Akers* to site visits by quasi-judicial bodies, however, requires a revisiting of statements previously made by this Court regarding such viewings. In *Comer,* this Court held that "before a local zoning body, whether it be the Commission or the Board, views a parcel of property in question, it must provide notice and the opportunity to be present to the parties." *Comer,* 130 Idaho at 439, 942 P.2d at 563. The Court quoted one of its prior decisions regarding a jury viewing for the reasons behind this holding:

> First, notice to the parties provides them with an opportunity to contest the propriety of such a viewing under the particular circumstances.... More importantly, notice to the parties provides them with an opportunity to be present at the time of the inspection, which in turn will insure that the court does not mistakenly view the wrong object or premises.

Id. (quoting *Highbarger v. Thornock,* 94 Idaho 829, 831, 498 P.2d 1302, 1304 (1972)). This holding is not inconsistent with *Akers* or this Court's other prior decisions regarding judicial viewings, and infers the ability of an applicant or other affected person to object to the viewing on the limited basis that the governing board or hearing body mistakenly viewed the wrong property. CRH does not make this argument in this case.

More problematic in applying *Akers* to site visits by quasi-judicial bodies is a *dictum* in this Court's opinion in *Eacret v. Bonner County*, 139 Idaho 780, 86 P.3d 494 (2004). In the context of a discussion of the factors surrounding the determination as to

whether a decision maker is biased, the Court stated on the one hand that a "quasi-judicial officer must confine his or her decision to the record produced at the public hearing," but, on the other hand, also stated that "the opportunity to be present at a view provides opposing parties the opportunity to rebut facts derived from the visit that may come to bear on the ultimate decision...." *Eacret*, 139 Idaho at 784, 86 P.3d at 498 (emphasis added).[8] While the former statement is consistent with this Court's holding in *Akers* that site visits do not themselves constitute evidence but instead merely allow the opportunity to apply and evaluate evidence already in the record, the latter statement is inconsistent with this holding. *Compare id. with Akers*, 2008 WL 2266993, at *4. If observations made at a site visit are not evidence, how can "facts derived from the visit" exist which would be subject to rebuttal?

In *Akers*, this Court vacated the decision of the District Court and remanded the matter to be heard before a different district judge for two reasons: first, because this Court found that the District Court erred by relying on observations made during the site visit as opposed to evidence in the record, and second, because this Court found that the District Court erred by making findings which were not supported by substantial evidence in the record. *Akers*, 2008 WL 2266993, at *4-*5. Because the site visit at

[8] In that case, the Court vacated and remanded a decision of the Bonner County Board of Commissioners on the basis of statements made by a commissioner who had cast the deciding vote to grant a variance which indicated an obvious bias in favor of the applicant. *Eacret*, 139 Idaho at 784-87, 86 P.3d at 498-501. For this reason and because the Court also found that the same commissioner had conducted a viewing of the property without notice to the parties which would have afforded them the opportunity to be present, the above quote was not necessary to the decision. *See id.*

issue in this case occurred prior to this Court's decision in *Akers*, the Board did not have the benefit of *Akers* decision as guidance at that time. In addition, this Court has not yet specifically applied this holding to viewings by quasi-judicial bodies.

Even if this Court were to apply *Akers* retrospectively to this site visit, however, it should not find that the conduct of the site visit prejudiced any substantial rights of CRH. Unlike the decision in *Akers*, this decision was based on substantial evidence in the record in the form of testimony, written statements and photographs concerning periodic flooding of the property and its potential effects on both future owners of property within the proposed subdivision and neighbors. *See* Agency R. p. 301-35, 382-406, 446-48; Agency Tr. p. 65-74. Conversely, nowhere in the transcript of the site visit is there any indication that the property was flooded at that time – a factor which would have cut in favor of CRH. *See* Agency Tr. p. 89-103. Therefore, to the extent the decision in this case may have been based in part on observations made during the site visit, this would at worst constitute harmless error.

This Court should also address the practical effects of applying *Akers* to site visits by quasi-judicial bodies, and the conduct of such visits in general. Do public hearings need to remain open for the purpose of a site visit if the observations made during that time are not evidence under *Akers*? Are statements made by members of the governing board or hearing body during a site visit merely deliberations, or must parties be afforded the opportunity to rebut such statements, as *Eacret* seems to indicate? Must the public hearing be continued or re-opened to receive objections that

the wrong property was viewed, as *Comer* requires, or may such objections be deemed legal argument and be received and decided after the public hearing is closed?

To sum up, this Court's recent decision in *Akers* should be applied to this case with the following considerations. First, the rule announced in *Akers* that site visits do not themselves constitute evidence but instead merely allow the opportunity to apply and evaluate evidence already in the record should be applied to site visits conducted by a quasi-judicial body as it is with respect to those conducted by judges or juries. Second, the Court's prior statements in *Comer* and *Eacret* should be reconciled to require only that the governing board or hearing body must provide an opportunity to object to the viewing on the limited basis that the wrong property was viewed before the decision is ultimately made on the application. Third, the Court should take this opportunity to address the practical application of its precedents, including its decision in this case, to the conduct of site visits by quasi-judicial entities. Finally, in this case, the Court should find that the District Court correctly held that conduct of the site visit in this case did not constitute a violation of the Open Meetings Law, or any other state law or county ordinance, did not constitute a violation of CRH's due process rights, and that it did not violate the standard announced in *Akers*, or alternatively, that any such violation constituted harmless error because the decision was supported by substantial evidence in the record. *Cf.* Tr. at 55-60.

C. There is no basis for this Court to award attorney fees to CRH on appeal.

Idaho Code § 12-117 governs the awarding of attorney fees in civil actions to which a public entity is a party. It reads, in pertinent part, as follows:

> (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.
>
> (2) If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery.

Idaho Code § 12-117(1)-(2). An award of attorney fees under this statute is unwarranted if the public entity "acted in a way that fairly and reasonably addressed the issue," even if a reviewing court later finds that such action involved an erroneous interpretation of a statute or ordinance. *Payette River Property Owners Ass'n v. Valley County*, 132 Idaho 551, 558, 976 P.2d 477, 484 (1999).

As discussed, the Board properly applied the relevant provisions of the Subdivision Ordinance and the Flood Ordinance in denying CRH's application, and did not prejudice any substantial rights of CRH in its conduct of the site visit at issue in this case. Therefore, the County should be deemed the prevailing party in this matter, precluding CRH from entitlement to attorney fees.

However, if the Court were to find that the Board erroneously applied these ordinances in considering CRH's application, or that substantial rights of CRH were prejudiced by the Board's conduct of the site visit at issue in this case, it is clear from the record that the Board, at the very least, made a reasonable, good faith effort to make a decision on this application in accordance with the mandates of LLUPA, applicable County ordinances, and this Court's prior precedents. Therefore, even if the Court were to decide that the Board's decision was based on an erroneous interpretation of the applicable law, an award of attorney fees under Idaho Code § 12-117 would be inappropriate because the decision had a reasonable basis in fact and law.

V. CONCLUSION

This is one case where a picture is truly worth a thousand words. The record of the proceedings before the County hearing examiner and before the Board included several photographs of the property which was the subject of the proposed "Cedar Creek Ranch Estates" subdivision which, in combination with testimony and written statements of neighbors, including some longtime residents of the area, showed that approval of the proposed subdivision would pose a very real potential danger to any houses which may have been built on the "meadow" portion of the property because it is prone to water saturation of soils at best, and outright flooding at worst. In addition, concerns were raised as to whether sewage could foul neighbors' drinking water if the system were to fail as a result of soil saturation or flooding. While CRH's

representatives did recognize these issues and made a good faith effort to address them, the Board found that these issues were not adequately addressed in the application as presented. Thus, the Board's decision is supported by substantial and competent, though conflicting, evidence.

In making this decision, the Board properly considered the mandatory findings contained in the Subdivision Ordinance and concluded that it was unable to make all of those findings because of the potential for flooding or soil saturation within certain of the proposed lots' building envelopes. It also did not make this decision in violation of any applicable provision of the Flood Ordinance, which, under these circumstances, placed the burden of production of BFE data on CRH's project engineer, not on the County.

The site visit which the Board conducted prior to its decision in this matter was properly noticed, and representatives of CRH were in attendance, though for reasons known only to them, they chose to remain where they initially assembled and did not follow the Board where it chose to view the property. Therefore, the basis for the complaints regarding violations of the Open Meetings Law and due process were the result of CRH representatives' own actions. In addition, the conduct of the site visit did not prejudice any substantial rights of CRH because under *Akers*, observations made during site visits do not constitute evidence and cannot provide a basis for a decision on the application – meaning that there is no evidence to rebut, with the limited exception of an objection that the wrong property was viewed, which has not been made here. Nevertheless, to the extent the Board may have based its decision on observations

made during the site visit, this would at worst constitute harmless error because the Board's decision was based on substantial evidence, unlike in *Akers*, and such observations did not serve to prejudice any substantial rights of CRH.

Therefore, for the reasons stated above, the decision of the District Court *affirming the decision* of the Kootenai County Board of Commissioners in Case No. S-842P-06 *should be* **AFFIRMED**.

Dated this 21st day of October, 2008.

Kootenai County Department
of Legal Services

Patrick M. Braden
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to I.A.R. 34, I hereby certify that on this 22nd day of October, 2008, I caused an original and six (6) bound copies and one (1) unbound, unstapled copy of this brief to be sent via first class mail, postage prepaid, to be filed with the Clerk of the Supreme Court, and further certify that I caused to be served two (2) true and correct copies of the foregoing via first class mail, postage prepaid, and addressed to the following:

Mischelle R. Fulgham
Paul R. Harrington
LUKINS & ANNIS, P.S.
250 Northwest Boulevard, Suite 102
Coeur d'Alene, ID 83814

Pursuant to I.A.R. 34.1, I further certify that I have sent a signed, electronic copy of this brief in searchable PDF format to the following e-mail addresses:

Clerk of the Supreme Court	sctbriefs@idcourts.net
Mischelle R. Fulgham	mfulgham@lukins.com

Patrick M. Braden

APPENDIX A

Kootenai County Subdivision Ordinance

Ordinance No. 344

KOOTENAI COUNTY SUBDIVISION ORDINANCE NO. 344

TABLE OF CONTENTS

AN ORDINANCE IN AND FOR THE UNINCORPORATED AREAS OF KOOTENAI COUNTY, IDAHO, ESTABLISHING SUBDIVISION REGULATIONS. PROVIDING PURPOSES, DEFINITIONS, AND APPLICABILITY; APPLICATION REQUIREMENTS AND APPROVAL PROCEDURES; DESIGN, IMPROVEMENT AND MAINTENANCE REQUIREMENTS; STANDARDS FOR CONSERVATION DESIGN SUBDIVISIONS; ADMINISTRATION AND ENFORCEMEMENT PROCEDURES; AND APPENDICES. REPEALING THE EXISTING ORDINANCE, AND PROVIDING FOR SEVERABILITY AND AN EFFECTIVE DATE.

NOW THEREFORE BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF KOOTENAI COUNTY, IDAHO:

ARTICLE 1
GENERAL PROVISIONS

SECTION 1.01 - TITLE
This Ordinance shall be known as the *Subdivision Ordinance of Kootenai County, Idaho.*

SECTION 1.02 - AUTHORITY
These regulations are authorized by Title 31, Chapter 7, Title 50, Chapter 13, and Title 67, Chapter 65 of *Idaho Code*; and Article 12, Section 2 of the *Idaho Constitution*, as amended or subsequently codified.

SECTION 1.03 - PURPOSE
The purpose of this Ordinance is to promote and protect the health, safety, and general welfare of the public and to:

- Ensure that development is in conformance with *Idaho Code,* with the goals and policies of the *Kootenai County Comprehensive Plan,* with the requirements of County ordinances, and with the requirements of other agencies.
- Provide for orderly development of land.
- Ensure that development mitigates negative environmental, social and economic impacts.
- Create buildable lots of reasonable utility and livability.
- Preserve, protect and enhance ground and surface water quality.
- Establish a transportation system for vehicles, bicycles and pedestrians that is safe, efficient, and cost effective and that minimizes congestion.
- Provide for adequate and affordable fire, water, sewer, stormwater and other services.
- Encourage the conservation of open space and environmentally sensitive areas.
- Provide for the administration of these regulations.

SECTION 1.04 - DEFINITIONS

Words used in the present tense include the future tense. Words used in singular number include the plural, and vice versa. The word "shall" and "must" are mandatory, and the word "may" indicates the use of discretion. Unless clearly stated otherwise, the following words and phrases shall have the following meanings:

Affected Person - One having an interest in real property that may be affected by a decision.

Agent - One who acts for or in the place of another.

Driveway – A means of vehicular access from a public or private road to a lot or parcel of land.

Driveway, Common – A driveway that provides vehicular access from a public or private road to more than one lot or parcel of land.

Easement - A right of use, falling short of ownership, usually for a certain stated purpose (*Idaho Code §50-1301).*

Final Plat - The final drawing of a subdivision and associated conveyances, to be recorded as a public document.

Financial Guarantee - An irrevocable letter of credit, cash deposit, bank account, or surety bond, pledged to secure the performance of an obligation.

Fire District – A structural fire protection district.

Frontage – The portion of a lot that is contiguous with the road used to access the lot.

Functional Classification - The classification of roads based on their function, with respect to both mobility and access. Functional classifications include interstates and state highways, principal and minor arterials, collectors and local streets.

Grade - Ground level. Also, the slope of a road specified in percent (%).

Green Space - Land meeting the definition of Green Space in Article 4 of this Ordinance.

Gross Acreage - The size of a lot or parcel including one-half (½) of adjoining rights-of-way.

Hearing Body - The entity charged with the conduct of a public hearing and a decision or recommendation on an application. The hearing body may be a Hearing Examiner, the Planning Commission or the Board of County Commissioners.

Hydrologic Protection Area - The area adjoining a lake, river, stream, wetland, water course or drainageway that must be reserved and shown on the plat. The purpose of this area is to protect downstream property owners and water resources from increased or decreased flows, to prevent sedimentation, to promote good water quality, and to protect fish and wildlife habitat.

Infrastructure - Support facilities for a subdivision including, but not limited to, water, sewer, road, fire protection, stormwater and utility systems. This term includes both project support facilities, and public system facilities serving the area.

Ladder Fuel –Shrubs, brush and woody debris that can carry a fire into the tree canopy.

Lake – A body of perennial, standing open water, larger than one (1) acre in size. Lakes include the bed, banks and wetlands below the ordinary high water mark. Lakes do not include drainage or irrigation ditches, farm or stock ponds, settling or gravel ponds.

Land Disturbing Activity - Any man-made change to the land surface, including the removal of vegetation and topsoil, filling, and grading, but not including landscaping or agricultural land uses such as planting, cultivating and harvesting of crops or trees.

Large Organic Debris (LOD) – Live or dead trees, and parts or pieces of trees, that are large enough or long enough, or sufficiently buried in the stream bank or bed, to be stable during high flows. Pieces longer than the channel width, or longer than twenty (20) feet, are considered stable. LOD creates diverse fish habitat and stable stream channels by reducing water velocity, trapping stream gravel and allowing scour pools and side channels to form.

Road, Public – A travel way for vehicles, owned and/or maintained by a public agency.

Road, Private – A travel way for vehicles, that is not owned or maintained by a public agency.

Sanitary Restrictions – Water and sewer requirements imposed on a subdivision plat per *Idaho Code* 50-1326.

Sensitive Areas – Sensitive areas are defined as a) land in, or within 300 feet of wetlands, streams, or lakes, b) areas where the water table is within 6 feet of ground surface at any time of the year, c) areas with slopes ≥25% or that exhibit signs of instability, d) habitat for rare, threatened or endangered plants or animals, e) areas where the ground surface is within 50 feet of an unconsolidated, sand or gravel aquifer, and f) areas of special flood hazard (flood zones).

Sewage Disposal System – A system of piping, treatment devices, receptacles, structures, or areas of land designed, used or dedicated to convey, store, stabilize, neutralize, treat or dispose of wastewater. This definition includes individual sewage disposal systems such as a septic system and drainfield.

Slope - An incline, described by the vertical change in elevation that occurs in 100 feet of horizontal distance (rise divided by run), expressed in percent (%). Slope is measured perpendicular to the contour of the land, and is the maximum incline for a given area.

Stream – A natural water course of perceptible extent, with definite beds and banks, which confines and conducts continuously or intermittently flowing water. Definite beds are defined as having a sandy or rocky bottom which results from the scouring action of water flow.

> **Class I** - A stream used for domestic water supply, or which is important for the spawning, rearing or migration of fish. Such waters will be considered to be class I upstream from the point of domestic diversion for a minimum distance of 1,320 feet.
>
> **Class II** – Usually headwater streams or minor drainages that are used by only a few, if any, fish for spawning or rearing. Where fish use is unknown, streams shall be considered class II where the total upstream watershed is less than two hundred forty (240) acres. The principal value of class II streams lies in their influence on water quality and quantity in class I streams.

Structure – That which is built or constructed.

Subdivision – The division of land into two or more lots or parcels of land by recording a deed or plat.

Topography - The configuration of the ground surface.

Topographic map – A map with lines of equal elevation, showing the relief and configuration of the ground surface.

Utility – A service provided to a subdivision, including water, telephone, power, cable, sewer and stormwater treatment and disposal.

Unobtrusive – Inconspicuous, not prominent.

Vested - Guaranteed as a legal right. The right to have a subdivision application processed according to regulations in place at the time a complete application was submitted.

Water System – A system of wells, pumps, piping, treatment devices, receptacles, and structures, designed, used or dedicated to obtain, convey, treat, or store water. A shared water system is a system that serves two or more lots within a subdivision.

ordinances, d) the lot line adjustment does not result in lots separated by a right-of- way or road and e) a statement is included on the deed of conveyance indicating that the instrument is being recorded for lot line adjustment purposes, and that the property being transferred is not a separate, buildable lot. Lot line adjustments that do not meet these requirements must go through the replat or minor replat process.

e. Boundary line adjustments to legally created, un-platted parcels, providing: a) no additional parcels are created, b) the resulting parcels meet the minimum size for the zone and are otherwise in conformance with all County ordinances, and c) the boundary line adjustment does not result in lots separated by a right-of-way or road. A parcel of land that is not buildable because it does not conform to County ordinances, or was created improperly, cannot be converted to a buildable parcel through a boundary line adjustment. *Note: Lot and boundary line adjustments are accomplished by recording a deed of conveyance for the property that will be transferred, and then, for the receiving parcel, recording a second deed describing the new, exterior parcel boundaries (so that an additional parcel of land is not inadvertently created).*

f. For original parcels of land, division into a maximum of four (4) parcels, providing each parcel is at least twenty (20) acres in size, the parcels are in conformance with all County ordinances, and providing each parcel has a recorded access easement to a public road. One-half (1/2) of adjoining rights-of-way may be included in acreage calculations. For purposes of determining eligibility for this exemption, acreage that has not been surveyed may be based on the aliquot parts of the section of land in which the parcel is located. For example, one-half (1/2) of a quarter quarter section will be considered to be 20 acres. Surveying will, however, be required for any subsequent divisions of land, and the parcels created will then be required to meet minimum lot sizes.

An original parcel of land is one that was separately described in a deed of conveyance prior to May 14, 1974, and was held as an individual parcel (it was not combined by deed). For original parcels less than eighty (80) acres in size, a maximum of one parcel may be created for each twenty (20) acres. For example, on a 60-acre original parcel, a maximum of three 20-acre parcels may be created. To receive this exemption, the property owner must provide documentation verifying that these requirements have been met, and that the exempt land divisions have not been previously taken.

g. Divisions made pursuant to a Last Will and Testament, following the death of the property owner, providing no more than four (4) parcels are created, each parcel has a recorded access easement to a public road, and each parcel meets the minimum size for the zone and is otherwise in conformance with all County ordinances.

h. Division resulting from the exercise of eminent domain. Per *Idaho Code* §67-6527, this is not a violation of this Ordinance.

2. Parcels of land created by court order, not associated with a Last Will and Testament, will not be eligible for building permits until the subdivision is approved, and a plat is recorded in conformance with the procedures of this Ordinance.

3. ♦Fees as adopted by Board resolution.

4. ♦Title report or similar document containing the legal description, ownership and easements for the property (two copies).

5. ☆Large plan and supplemental pages – must meet the requirements outlined in Table 2-1 (three copies for the County, two for highway district, one for other agencies).

6. Small plan - 11" x 17" copy of the plan and supplemental pages.

7. Surrounding Area/ Adjoining Subdivisions Map - scale not less than 1"=400', showing adjoining subdivisions; street and lot layout sufficiently distant from the project to illustrate the relationship to proposed streets and lots; neighboring land owned by the same applicant; and surrounding properties within ¼ mile or 2 parcels (whichever is greater) in every direction (three copies).

8. ☆♦Photos - at least six pictures of the site, taken at various angles, depicting the general character of the site, accompanied by a map showing the location and orientation of the photos.

9. ☆♦Narrative – listing the acreage of the subdivision; the number of lots proposed; the location, approximate dimensions, and intended use of any nonresidential lots (e.g. for utilities, schools, churches, parks or open space); the characteristics of the site, including existing vegetation, soils and wildlife; what is proposed for water, sewer service, roads, trails or other improvements; plans for preserving land for timber, agriculture, recreation, wildlife or other open space uses; proposed phasing; proposed conveyances, including conservation easements; special design features of the subdivision such as clustering of lots or conservation design; the proposed completion schedule; and proposed methods of ownership and maintenance of open space, shared infrastructure and improvements. As part of the application narrative, a qualified professional engineer, or other qualified professional, must provide a written statement regarding the presence or absence of wetlands on the property, and the applicant must identify sensitive areas, as defined by this Ordinance.

10. ♦Groundwater quantity – adequate information must be provided to ensure that new or existing wells will provide sufficient water for the subdivision, without negatively affecting nearby property owners. The following are required:

    a. Subdivisions served by a well on each lot: Documentation by an Idaho licensed professional engineer (P.E.) or geologist (P.G.) that the aquifer proposed for water supply has sufficient production capability to provide drinking water to all of the lots in the proposed subdivision, and that a location is available within each lot for installation of a well without conflicting with proposed sewage systems.

    b. Subdivisions served by a new water system serving from two to nine lots: Documentation by an Idaho licensed P.E. or P.G. that the sources proposed for water supply have sufficient production capability to provide drinking water to the lots in the proposed subdivision.

    c. Subdivisions served by a new public drinking water system: DEQ written approval of an engineering report prepared by an Idaho licensed P.E. or P.G. demonstrating that an adequate water supply is available to meet the estimated demand for water from the lots in the proposed subdivision.

    d. Subdivisions served by connection to an existing public water system: A letter from the owner of the system indicating it has sufficient reserve production capacity to supply water to the lots in the proposed subdivision.

and the *Classification of Wetlands and Deepwater Habitats of the United States*, published by the U.S. Dept. of the Interior, Fish and Wildlife Service. In addition to delineating the boundaries and classifying the wetland, the professional must provide a report explaining the likely impacts of the project on the wetland, and recommend actions to mitigate the impacts and preserve the wetland plants and animals.

16. Existing Resources/ Site Analysis Map (only required for conservation design subdivisions requesting bonus lots) - This map must be prepared by a landscape architect in consultation with a professional wildlife or conservation biologist or the Idaho Department of Fish and Game, and shall be shown as a supplemental page to the plan at a scale between 1"=40' and 1"=100'. This map shall cover the conditions on and within 500 ft. of the property and must show woodlands and mature timber; active farm and pasture land; adjacent public lands and lands under conservation easement; habitat for rare, threatened or endangered plants or animals (if known); important wildlife habitat; historic or cultural features; areas with scenic views; hillsides and other areas visible to the public; disturbed areas; natural features such as streams, ponds, rock outcrops, unusual geologic formations, forested areas, and wetlands; and existing roads. In addition to a paper copy, at least one clear overlay copy of the map shall be provided. If available, an aerial photograph of the site, with boundaries marked, shall also be submitted.

B. Application Requirements – Final Subdivision Approval

The following items constitute a complete application for final approval of a major subdivision. The applicant is required to submit one application packet. An application that is incomplete will not be processed. (Items shown with a ♦ are required for minor subdivision applications, which are explained in Section 2.02).

1. Application Form – a completed application form with property owners' signature(s) or a notarized letter from the property owners' authorizing the applicant to file the application.

2. Completed check list of application requirements.

3. Fees as adopted by Board resolution.

4. ♦Large plat, signature page and supplemental pages prepared by an Idaho- licensed surveyor, meeting the requirements outlined in Table 2-1 and *Idaho Code* Title 50 Chapter 13.

5. ♦Small plat - 11" x 17" copy of the plat and supplemental pages.

6. Narrative - explaining how the conditions of approval were met; the status of phasing and infrastructure improvements; the total acres and number of lots in the final proposal; any modifications from the original proposal; and confirming that road signs and corner monuments have been installed.

7. For major subdivisions in timbered areas, a wildfire mitigation plan, prepared by a professional forester, and certification from the forester that the plan has been implemented. The plan must meet the requirements of Appendix A and be approved by the fire district, the Director, or Idaho Dept. of Lands.

8. A site disturbance permit or written exemption issued by the Department, and if stormwater management systems are completed, as-built approval from the design professional.

9. Any documentation needed to show compliance with requirements or conditions of approval, including a written agreement for garbage collection service.

TABLE 2-1
FORM AND CONTENT OF SUBDIVISION PLAT/ PLAN AND SUPPLEMENTAL PAGES

The items with an * must be shown on supplemental pages. All other items must be included on the plat/plan.

PLAT/ PLAN COMPONENT	MAJOR SUB.		MINOR SUB. PLAT
	PREL PLAN	FINAL PLAT	
1. Size and Format (see *Idaho Code* §50-1304) - 18" x 27". Plat must encompass all land involved in the subdivision, including open space that will not be used for building lots. Must also include north arrow, date, legend, vicinity map and scale. Scale must be suitable to insure clarity, between 1 in.=40 ft. and 1 in.=100 ft	X	X	X
2. Subdivision Name – must meet *Idaho Code* §50-1307. For conservation design subdivisions the name must include the suffix "CDS".	X	X	X
3. Location - section, quarter section, township, range, meridian, county and state.	X	X	X
4. Proposed lot lines, or estimated number of lots for each area. All lots numbered consecutively in each block and each block lettered or numbered. Adjacent parcels shown with dashed lines. Approximate gross and net acreage of each lot (with/ without right-of-way.	X		
5. Final lot lines and the exterior boundary of the plat shown by distance and bearing. Description of lot corner and centerline monuments, including material, size, and length. Initial points and basis of bearings. Tie to two public land surveys or other monuments recognized by the County Surveyor. Curve and radius data. Reference to records of survey. Net lot sizes in square feet, or acreage to three decimal places.		X	X
6. Roads and Trails - within and adjacent to the subdivision. Existing and proposed rights-of-way and easements, with centerlines, widths, and location clearly shown and instrument numbers noted. Easements and rights-of-way not dedicated to a highway jurisdiction must be dedicated or conveyed to the entities responsible for maintenance. Road names must meet County ordinance, and be approved by the Department. Privately maintained roads must be designated as such.	X	X	X
7. Other Easements - the location, dimensions, and purpose of other existing or proposed easements, with instrument numbers noted. Required easements must be shown for protection areas along streams, wetlands and other water bodies, for components of shared infrastructure and improvements, and for individual sewage lines and drainfields that will not be located on the same parcel as residences.	X	X	X
8. *Topographic Elevations – contours shown at vertical intervals of not more than 5 ft., at a scale between 1 in.=40 ft. and 1 in.=100 ft., and identifying the following slope zones: 0-14% 15-34% ≥35% For minor subdivisions, topographic elevations are only required for areas where land will be disturbed for roads, driveways or structures. Contours shall be generated from field survey or aerial photography, and may not be interpolated from USGS maps. Contours are not required for lots designated as open space that will not be used for roads or structures.	X		X
9. *Hydrography – drainages, water courses, water bodies, and wetlands, including required hydrologic protection areas.	X		X
10. *Physical Features – the location of significant physical features such as ridges, rock outcrops and wooded areas.	X		
11. *Flood Plain – the location of any areas of special flood hazard, and language required by the County Flood Damage Prevention Ordinance.	X	X	X

C. Approval Process and Requirements

The major subdivision process has three steps, 1) preliminary subdivision approval, 2) construction approval (including review and approval of plans prior to construction and as-built approval when construction is complete), and 3) final subdivision approval followed by plat recordation. Phasing of subdivisions and improvements is permitted, providing it is requested in the preliminary application, each phase includes at least ten (10) lots, and a proposed completion schedule is provided.

1. *Preliminary Subdivision* Approval Process and Requirements

   The steps for gaining preliminary approval of a subdivision are as follows. Subdivisions with lots < 5 acres and natural slopes that equal or exceed 35%, must a) be developed as a conservation design subdivision in accordance with Article 4 of this Ordinance, or b) receive concurrent approval of a Planned Unit Development (PUD) permit, and design the development to fit the houses and roads into and around the hillside in a manner that minimizes disturbance of the terrain, vegetation and drainageways, that will not result in soil erosion, and that is compatible with the natural characteristics of the area. Applications for a subdivision and PUD permit may be combined.

   a. Site inspection and sketch plan review with a County planner. The applicant must provide a sketch plan, consisting of simple, conceptual drawings, showing the layout of proposed streets, lots (or areas for lots) and conservation areas. The planner and applicant will review the approval process and consider the design and feasibility of the proposal. In conservation design subdivisions where bonus lots will be requested, the applicant must also provide an Existing Resources/ Site Analysis Map.

   b. Existing Site Disturbance and Violations. If any un-permitted site disturbance or subdivision development has previously occurred (e.g. construction of roads, driveways, building pads), a County site disturbance permit must be obtained, a financial guarantee must be provided, and stormwater and erosion control systems meeting the requirements of the *Kootenai County Site Disturbance Ordinance,* associated resolutions, and applicable BMP's must be installed and approved before an application for a subdivision will be accepted. As a condition of preliminary subdivision plan approval, the Board may require replacement of trees and vegetation needed for screening and buffering of the subdivision. Any other violations of County ordinances must also be corrected prior to application.

   c. Subdivision Design. The applicant and their design consultant lay out the proposed subdivision, and the project surveyor draws the proposed plan. Surveying of lot lines is not necessary until after preliminary approval is granted. Conservation design subdivisions must follow the design procedure presented in Section 4.04.

   d. Neighborhood Meeting. Prior to submitting an application for a major subdivision, the applicant is encouraged to meet with neighbors to discuss the proposed project.

   e. Application. Applicant submits complete application packets for the County and other reviewing agencies as determined by the Director. The application and plat must meet the requirements of Section 2.01.A. and Table 2-1. Incomplete applications will not be processed.

   f. Agency Review. If the application is complete, the County forwards it to other agencies and organizations with relevant expertise or jurisdiction, requesting their evaluation and response within 30 days. Some agencies have additional requirements, and after the packets have been mailed, the applicant should contact each agency and meet their requirements. Agency responses should explain whether the proposal appears feasible and will meet the agency's requirements; any negative effects that may result from the subdivision; any actions needed to mitigate negative effects and ensure that the development does not compromise the quality, or increase the cost of

(1) Close the hearing and recommend approval, with or without conditions. Conditions that are proposed to mitigate impacts must be commensurate with the impact;
(2) Close the hearing and recommend denial; or
(3) Continue the hearing to allow for additional information or testimony. If the hearing is continued, action (e.g. approval, denial, scheduling of another hearing) must be taken within eight (8) weeks, unless otherwise approved in writing by the applicant.

Unless otherwise approved by the applicant, the hearing body shall make a recommendation within five (5) weeks of the close of the hearing. In the event the hearing body fails to carry out its responsibilities according to these regulations, the Board shall assume the duties of the hearing body.

k. Hearing Body Recommendation and Required Findings. In making the recommendation to the Board, the hearing body shall consider the application materials that were submitted, and the relevant evidence and facts in the record. The applicant bears the burden of demonstrating compliance with requirements. To recommend preliminary approval of the proposal, the hearing body must make the following findings:

(1) The applicant provided adequate information to determine compliance with requirements.
(2) The plan and supplemental pages meet the requirements of Table 2-1.
(3) The subdivision proposal meets (or is capable of meeting) the requirements of this Ordinance.
(4) The plan, project and proposed lots are capable of meeting all other applicable County ordinances without variances (e.g. the Zoning, Site Disturbance, Road Naming, Area of City Impact and Flood ordinances).
(5) The plan, project and proposed lots are capable of meeting the requirements of other agencies.
(6) The proposal will contribute to orderly development of the area. Proposed uses, design and density are compatible with existing homes, businesses, neighborhoods, and with the natural characteristics of the area. The subdivision will create lots of reasonable utility and livability, which are capable of being built upon without imposing an unreasonable burden on future owners. Areas not suited for development are designated as open space.
(7) Where appropriate, the proposed subdivision will have adequate open space for recreation, wildlife, agriculture or timber production. Road construction and disturbance of the terrain, vegetation and drainageways will be minimized and will not result in soil erosion. The design will adequately address site constraints or hazards and will adequately mitigate any negative environmental, social or economic impacts.
(8) Services and facilities such as schools, electricity, water, sewer, stormwater management, garbage disposal, EMS, police and fire protection are feasible, available and adequate. The proposal includes on and off site improvements, and if necessary payments, to mitigate the impacts of the subdivision so that it does not compromise the quality, or increase the cost, of public services. Mitigation actions or fees must be commensurate with the impacts of the subdivision, and fees must be authorized by law.
(9) Proposed roads, sidewalks and trails establish or adequately contribute to a transportation system for vehicles, bicycles and pedestrians that is safe, efficient and that minimizes traffic congestion.
(10) The proposal is not anticipated to result in significant degradation of surface or ground water quality as determined by DEQ.
(11) Public notice and the processing of this application met the requirements set forth in this Ordinance, County adopted hearing procedures and *Idaho Code*.

If the proposal meets these requirements, the hearing body shall recommend preliminary approval. If the proposal cannot meet these requirements, or if insufficient information was

Occupancy is not issued until roads, water, fire, sewage systems and other infrastructure serving the home are complete and approved. Except for the model home, non-infrastructure building permits will not be issued until the plat has been recorded and all required improvements are completed and approved by the applicable agencies.

3. Final Subdivision Approval and Plat Recordation

The steps for gaining final approval of a subdivision are as follows:

a. Application. The applicant submits one complete application packet. The application and plat must meet the requirements of Section 2.01.B. and Table 2-1 of this Ordinance, *Idaho Code* Title 50, Chapter 13, any other applicable County ordinances (e.g. Zoning, Road Naming, Area of City Impact , Flood ordinances), as well as agency requirements. For final subdivision applications, the applicant is responsible for obtaining agency approval letters. If the application is not complete, it will not be processed.

b. Director Recommendation and Required Findings. The Department reviews the application and the relevant facts and evidence in the record and the Director issues a recommendation. The applicant bears the burden of demonstrating compliance with requirements. To recommend final approval of the subdivision, the Director must make the following findings:

(1) The applicant provided adequate information to determine compliance with requirements.
(2) The plat meets the requirements of Table 2-1 and *Idaho Code* Title 50, Chapter 13, and is substantially the same as was presented in the preliminary application.
(3) The project and the lots meet the requirements of this Ordinance.
(4) The plat, the project and the lots are in compliance with other County ordinances without variances (e.g. Zoning, Site Disturbance, Road Naming, Area of City Impact_and Flood ordinances).
(5) The plat, the project and the lots meet the requirements of all agencies.
(6) The subdivision creates lots of reasonable utility and livability, capable of being built upon without imposing an unreasonable burden on future owners.
(7) Negative environmental, social and economic impacts have been (or will be) mitigated.
(8) On and off site improvements and, if necessary and authorized by law, payments have been made to mitigate the impacts of the subdivision, so that it does not compromise the quality or increase the cost of services.
(9) The sanitary restrictions will be lifted prior to recordation.
(10) All conditions of approval were met.
(11) Improvements are either a) complete and approved by the appropriate agencies, or b) construction plans have been approved and a financial guarantee, approved by the Director and the agencies with jurisdiction, and meeting the requirements of Section 3.04 and Appendix C, has been provided. If an agency is unable or unwilling to approve a financial guarantee, the Director shall assume this authority.
(12) If any land, shared infrastructure, or improvements will be privately maintained, documents establishing the maintenance organization have been approved by the Director, and are ready to be recorded with the plat.
(13) Any required conservation easements or other documents have been approved by the Director and are ready to be recorded with the plat.
(14) For phased projects, the current phase, in and of itself, is in compliance with all of the requirements of Kootenai County and other agencies.
(15) Public notice and the processing of this application met the requirements set forth in this Ordinance and *Idaho Code*.

If the application and the subdivision meet these requirements, the Director shall recommend approval; if it does not meet these requirements, or if insufficient information was provided to

A. Application Requirements

The subdivision application and plat contain the information that the County needs to make a decision on a subdivision proposal. To gain approval, adequate information must be provided to demonstrate that the project can meet the requirements of the County and of other agencies.

For a minor subdivision, the applicant is required to submit one complete application packet to the County, plus additional packets for each agency/ organization reviewing the proposal. The Director determines which agencies will receive applications and the County will forward the packets to those agencies. An applicant may request that an incomplete application be accepted, by submitting a letter stating which items are missing and giving a detailed explanation and rationale for the incomplete submission. If the Director determines that the information is not necessary to establish conformance with the required findings (Section 2.02.B.8.), he may approve the request, the application will be deemed to be complete, will be vested under current ordinances, and will be processed; if the Director denies the request, the application will not be processed until it is complete. This determination may be appealed in accordance with Section 5.02. An application shall be governed by the rules and policies in effect on the day a complete application is submitted to the Department.

The items that constitute a complete application for a minor subdivision are listed in Sections 2.01.A. and B and are identified by a ♦ symbol. The required elements of agency packets also have a ☆ symbol.

B. Approval Process and Requirements

The steps for gaining approval of a minor subdivision are as follows. Subdivisions with lots < 5 acres and natural slopes that equal or exceed 35%, must be developed as a conservation design subdivision in accordance with Article 4 of this Ordinance, and must be designed to fit the houses and roads into and around the hillside in a manner that minimizes disturbance of the terrain, vegetation and drainageways, that will not result in soil erosion, and that is compatible with the natural characteristics of the area.

1. Site inspection and sketch plan review with a County planner. The applicant must provide a sketch plan, consisting of simple, conceptual drawings showing the proposed layout of lots and, if applicable, conservation areas. The planner and applicant will review the approval process and consider the feasibility of the proposed design.

2. Existing Site Disturbance and Violations. If any un-permitted site disturbance or subdivision development has previously occurred (e.g. construction of roads, driveways, building pads), a County site disturbance permit must be obtained, a financial guarantee must be provided, and stormwater and erosion control systems meeting the requirements of the *Kootenai County Site Disturbance Ordinance*, associated resolutions, and applicable BMP's must be installed and approved before an application for a minor subdivision will be accepted. As a condition of approval, the Board may require replacement of trees and vegetation needed for screening and buffering of the subdivision. Any other violations of County ordinances shall also be corrected prior to application.

3. Subdivision Design. The applicant and their design consultant lay out the subdivision, and the project surveyor then draws the plat.

4. Neighborhood Meeting. Prior to submitting an application for a minor subdivision, the applicant is encouraged to meet with neighbors to discuss the proposed project.

5. Application. The applicant submits complete application packets for the County and other reviewing agencies, as determined by the Director. Incomplete applications will not be processed.

6. Agency Review. If the application is complete, the County forwards it to other agencies and organizations with relevant expertise and jurisdiction, requesting their review and response within 30

h. Services and facilities for subdivision residents are available and adequate; if necessary and authorized by law, payments have been made to mitigate the impacts of the subdivision, so that it does not compromise the quality or increase the cost of services. Mitigation actions must be commensurate with the impacts of the subdivision.
i. Trails and sidewalks for the subdivision establish or adequately contribute to a transportation system for bicycles and pedestrians that is safe, efficient and that minimizes traffic congestion.
j. The sanitary restrictions will be lifted prior to recordation.
k. If any land, shared infrastructure, or improvements will be privately maintained, documents establishing the maintenance organization have been approved by the Director, and are ready to be recorded with the plat.
l. Any required conservation easements or other documents are ready to be recorded with the plat.
m. Public notice and the processing of this application met the requirements set forth in this Ordinance and *Idaho Code.*

Unless otherwise approved by the applicant, the Director shall make a decision within five (5) weeks of the close of the comment period. If the proposal meets these requirements, it shall be approved. If it does not meet these requirements, or if insufficient information was provided to determine compliance, it may be denied. Conditions may be attached to the approval, and the County will check for compliance with these conditions before the plat is recorded. The Director's decision may be appealed in accordance with the process outlined in Section 5.02 of this Ordinance.

9. Recordation. Within 120 days of approval, the applicant must meet any conditions and submit the mylar plat and any associated documents in a form ready to record. The applicant obtains all signatures on the plat and documents, except County signatures. All signatures and stamps must be in reproducible, quick drying, permanent, indelible, black ink. A current title report, or similar document verifying ownership, must also be submitted with the plat. The Department obtains the County signatures and with the applicant records the plat and other documents. If the plat is not submitted within 120 days, and an extension is not granted by the Director, approval is null and void and a new application must be submitted. An extension of time for recordation may be granted by the Director for cause. As part of a subsequent application, updated agency letters may be required if conditions or approvals may have changed.

10. Lot Sales. If a portion of the property that is the subject of a subdivision request is divided prior to recordation of the plat, the application becomes null and void, and a new application must be filed by the owners. If the property is not divided, and is sold in its entirety, a new application is not required and the new owner or owners may proceed through the subdivision process with the existing application.

SECTION 2.03 – MINOR REPLATS AND AMENDMENTS

This section outlines the requirements for making minor modifications to a previously recorded subdivision plat or portion of a plat, when the modification cannot be accomplished as a lot line adjustment in accordance with Section 1.06.B. Minor modifications include insignificant changes in wording, corrections, and for up to four (4) lots, consolidations and lot line adjustments where no additional lots are created. Un-platted land may be added to existing subdivision lots as part of a minor lot line adjustment replat. Substantial changes to a plat, such as those that would affect the location of roads, driveway approaches, septic systems, building sites, easements or utilities; that would create additional lots; that would affect more than four (4) lots; or significant changes in verbiage that might affect a property owner's use of their land, or of commonly held land or easements, must go through the minor or major subdivision process (whichever applies).

A. **Application Requirements.** The following items constitute a complete application for approval of a minor replat or Amendment. The applicant is required to submit one complete application packet to the County, plus additional packets for each agency/ organization reviewing the proposal, as determined by the Director. Incomplete applications will not be processed nor vested under current ordinances.

SECTION 2.04 - PLAT, RIGHT-OF-WAY OR EASEMENT VACATION

Vacation of existing plats, rights-of-way, easements, or other conveyances shall be processed in accordance with *Idaho Code*, Title 50, Chapter 13. Vacations of public streets and rights-of-way shall be administered by the highway agency with jurisdiction.

SECTION 2.05 - TIME EXTENSION FOR PRELIMINARY SUBDIVISION APPROVAL

Preliminary subdivision approval is valid for two (2) years, unless an alternate completion schedule was requested in the preliminary application, and was approved by the Board. This option is only available for subdivisions done in conjunction with a Planned Unit Development, or that include three or more phases with a total of ~~75~~ 50 or more lots.

At any time prior to expiration of preliminary approval of a major subdivision, one extension of up to two (2) years may be requested according to the following procedure. For phased developments, one automatic two-year extension will be granted when the first phase is recorded. Subsequent extensions for phased developments may be requested in accordance with this Section.

A. **Application Requirements.** The following items constitute a complete application:

1. Application form.

2. Fees as adopted by Board resolution.

3. Narrative explaining: a) the reasons the subdivision was not developed within the original timeline, b) the status of compliance with the original conditions of approval, and c) the anticipated time schedule for completing the platting process.

4. As part of a complete application, the Director may require additional information to determine compliance with conditions of approval, County ordinances, or the requirements of other agencies.

B. **Approval Requirements**

The Director may grant the extension providing: a) a complete application was submitted, b) the project is in compliance with the requirements of the County and other agencies (those that were in place at the time a complete preliminary application was received by the Department), and c) the project is in compliance with its conditions of approval. Unless otherwise approved by the applicant, the Director shall make a decision within five (5) weeks of the receipt of a complete application. The Director's decision may be appealed in accordance with Section 5.02 of this Ordinance.

SECTION 2.06 - CONDITION MODIFICATION

At any time prior to expiration of subdivision approval, a modification of a condition of approval may be requested according to the following procedure:

A. **Application Requirements.** The following items constitute a complete application:

1. Application Form.

2. Fees as adopted by Board resolution.

3. A narrative explaining why a condition modification is necessary.

ARTICLE 3.0 - DESIGN, IMPROVEMENT AND MAINTENANCE REQUIREMENTS

SECTION 3.01 - DESIGN REQUIREMENTS

This section of the Subdivision Ordinance delineates the minimum, on site design requirements for both major and minor subdivisions. While off site improvements may also be required to mitigate the effects of the development, these will be considered project by project.

A. General Requirements

1. Land Suitability. No land shall be subdivided which the Board finds to be unsuitable for building sites because of potential hazards such as flooding, inadequate drainage, severe erosion potential, site contamination, excessive slope, rock fall, landslides, subsidence (sinking or settling), high ground water, inadequate water supply or sewage disposal capabilities, high voltage power lines, high pressure gas lines, poor air quality, vehicular traffic hazards, or any other situation that may be detrimental to the health, safety, or welfare of residents or the public, unless the hazards are eliminated or adequately mitigated.

2. Within the Kootenai County Airport Overlay Zone, the proposal must be in conformance with the Airport Master Plan and the plat must include an avigation easement approved by the Airport Director.

3. For lots that will not be used for habitable structures, such as open space, unmanned utility lots and dock lots, the Board may waive the requirements for some services and facilities listed in Article 3, providing the public, agencies, infrastructure, and future lot owners will not be negatively affected.

Note: For lots equal to or greater than 5.00 acres, the size of the lot may be figured using gross acreage (including ½ of adjoining rights-of-way). All other lot sizes are based on net density, being the amount of land per dwelling unit excluding the area for roads, parks, common open space, utility facilities, and any other nonresidential use.

C. Utility and Service Standards

1. Domestic Water Systems.

   a. When a water district or utility regulated under *Idaho Code* Title 61 (Public Utility Regulation) provides a "will serve" letter for a subdivision, annexation and/or connection may be required. If not required, for shared water systems serving 10 or more lots, the applicant shall form a water district or utility corporation (non-profit or for profit) to own, operate and maintain the system. Water districts and utility corporations must be established in conformance with applicable law, and cooperative corporations such as homeowners associations must also meet the requirements of Section 3.03 and Appendix B of this Ordinance.

   b. The new components of a water system and any necessary improvements to an existing system, must be designed and constructed in conformance with the requirements of the Idaho Department of Environmental Quality, the *Idaho Division of Public Works, Idaho Standards for Public Works Construction,* the fire district, and if applicable, the water district, utility or corporation. Distribution lines shall be installed to each lot.

2. Fire Protection Systems

   Subdivisions shall meet the requirements of the fire district, including those pertaining to roads, driveways, fire flows, hydrants, water storage and defensible space. In addition, each lot shall have a building site capable of being accessed by a driveway meeting the minimum standards of the *Kootenai County Zoning Ordinance* or the fire district.

   Subdivisions shall also minimize the hazards associated with wildfire, and major subdivisions in timbered areas shall provide a fire mitigation plan, developed by a professional forester, that meets the requirements of Appendix A and is approved by the Director, the fire district, or the Idaho Department of Lands. The plan must be implemented as part of the required improvements for the subdivision.

3. Sewage Disposal Systems. If a public sewage system is available and provides a "will serve" letter, connection shall be required. If a private, shared sewage system is available and provides a "will serve" letter, connection may be required, providing the cost of service is commensurate with that charged to existing customers. If connection to a shared system is required, collection lines shall be installed to each lot. All sewage disposal systems shall meet the standards of the Panhandle Health District and/or DEQ. If required, shared sewage systems shall be installed and approved, or the necessary improvements secured by a financial guarantee, prior to final approval of the subdivision. Individual septic systems may be installed after final subdivision approval, in conjunction with building permits.

4. Underground Utility Placement. Unless utility providers determine that site conditions preclude underground utility installation, all utilities shall be installed underground.

5. Stormwater Management. Lots shall be laid out to provide drainage away from building sites. Stormwater management and erosion control shall meet the requirements of the *Kootenai County Site Disturbance Ordinance* in accordance with best management practices approved by the County. Infiltration of stormwater in small quantities is preferred. The collection and concentration of stormwater in detention and retention basins, wet ponds, constructed wetlands or similar facilities is discouraged and shall only be allowed when there is no feasible alternative. The installation of curbing

All building lots must have at least one building site that can meet required setbacks and be accessed with a driveway meeting the standards of the *Zoning Ordinance* or fire district.

3. Lot Access. All new lots shall have frontage and direct access onto a road or common driveway meeting the standards of Section 3.01.F. of this Ordinance. A lot with an existing residence shall not be considered a new lot. For irregularly shaped subdivisions, or sites with severe physical constraints, the Board may allow access to individual lots via an easement. Driveway approaches to public roads must be approved by the highway district or ITD. No new accesses to individual lots are permitted from State Highways or arterial roads as shown on the highway district's current Functional Classification Map. In some cases ITD or the highway district may require relocation, reconfiguration, consolidation or elimination of existing approaches.

4. Continuity. No single lot shall be divided by a right-of-way, road, common driveway, municipal or County boundary line, or other parcel of land.

F. Roads and Trails

1. Road Standards. With the exception of common driveways approved by the Board and the highway district, roads in subdivisions shall meet the *Highway Standards for the Associated Highway Districts, Kootenai County, Idaho,* including all provisions for variance, exception or other means of deviation from the Standards, as approved by the applicable highway district. If a highway district approves a road with a variance, the road will be deemed to comply with the *Standards* and with the requirements of this Ordinance. Except for gated communities approved by the Board, such roads shall be dedicated to the applicable highway district; in gated communities the highway district shall verify that the road meets their *Standards*, and the road shall be dedicated to the maintenance entity. If a road meeting highway district standards is required, it shall be constructed through the subdivision, to the property line, unless topography or other factors make continuation of the road impossible.

   The Board may approve a privately maintained, common driveway as the means of access to new lots, if it serves, has the potential to serve, or is used to access no more than four lots or parcels, and the highway district with jurisdiction makes the following findings:

   a. A road through the land proposed for subdivision is not appropriate or necessary to provide access to private lands lying adjacent to or beyond the subdivision, and

   b. Access through the land is not now necessary, nor will it be necessary in the future, to provide continuity of public roads with functional grades and design, and

   c. The lots being created will not be further subdivided, and no additional access to the driveway will be allowed, until it is constructed in accordance with this Ordinance and the *Highway Standards for the Associated Highway Districts, Kootenai County, Idaho (*with or without variances approved by the highway district). The Board may require a restriction on the plat, or the recordation of a public covenant in favor of the County and the highway district, to ensure compliance with this requirement.

   Common driveways are a required infrastructure improvement, and shall be constructed prior to final approval of a subdivision, unless a financial guarantee is provided, then they shall be constructed prior to issuance of non-infrastructure building permits. Common driveways must be constructed in accordance with the *Kootenai County Code*, Title 9, Section 9-1-4, Access Roadway/ Driveway Standards for Residential Properties.

2. Connectivity. Roads, trails and sidewalks in subdivisions shall be designed to complement and enhance existing transportation systems, so as to create an integrated network that allows for the safe and efficient movement of people within the subdivision, to adjacent subdivisions, and to nearby

3. Hydrologic Protection Areas.

When a subdivision abuts a lake, river, stream, wetland, or drainage way, a Hydrologic Protection Area must be reserved and shown on the plat. The purpose of this area is to protect downstream property owners and water resources from increased or decreased flows, to prevent sedimentation, to promote good water quality, and to protect fish and wildlife habitat. The area shall be labeled "Stream (lake or wetland, as applicable) Protection Area", and within this area native vegetation and large organic debris shall be protected or replanted to leave the area in the most natural condition possible. Any necessary maintenance must be in conformance with the *Kootenai County Site Disturbance Ordinance* and with applicable best management practices. Proposed road and utility crossings must be shown on the plat, must be kept to a minimum, and must take the shortest possible route across the area. Other than approved crossings, roads and utilities shall not be constructed within this area. Fences, walkways which do not exceed four (4) feet in width, stairway landings which do not exceed six (6) feet in length or width, and trams may be constructed in hydrologic protection areas, providing there is minimal disturbance of the ground and vegetation. The Board may require that this area be shown as an easement, including a conservation easement, or that ownership of the area be transferred to a homeowners association, highway district or other maintenance entity.

Hydrologic Protection Areas shall be as follows:

Lakes	45 feet from the ordinary high water mark
Spokane and Coeur d'Alene Rivers	45 feet from the ordinary high water mark
Class I Streams	75 feet from the ordinary high water mark
Class II Streams	30 feet from the ordinary high water mark
Drainageways	5 feet
Wetlands	Determined by the Board based on the wetland analysis.

SECTION 3.02 - IMPROVEMENT REQUIREMENTS

A. **Installation of Improvements.** Before application for final approval of any plat, required improvements shall either a) be installed and approved by the design professional who developed the plans and the agencies with jurisdiction, or b) a financial guarantee and subdivision completion agreement, in conformance with Section 3.04 and Appendix C, and approved by the Director, shall be provided to ensure installation. If a portion of the work has been completed and approved by the design professional and agency with jurisdiction, only the remaining work need be covered by the financial guarantee.

B. **Plan Approval and Site Disturbance Permit.**

1. No site disturbance, terrain modification, construction or clearing shall take place until preliminary subdivision approval has been granted, construction plans have been approved by the appropriate agencies, and a site disturbance permit has been issued by Kootenai County.

2. All construction plans shall be stamped and/or signed by an Idaho-licensed professional engineer or other appropriate design professional.

3. Dust Control Required. Dust control is required on all construction sites, and a dust control plan must be submitted for review and approval by the County prior to the start of any site work.

SECTION 3.03 – OPERATION AND MAINTENANCE REQUIREMENTS

A. **Operation and Maintenance Required.** All subdivision improvements, common areas and green space shall be operated and maintained by the owner(s), in accordance with applicable best management practices (BMP's) and approved plans. An organization that will operate and maintain shared land and improvements must be established prior to or concurrent with final approval and recordation of the plat. Organizational

3. CD or other bank account, providing the Board of Commissioners has exclusive access to the account.

The County may, at its discretion, accept surety bonds for required warrantees, and for a portion of financial guarantees for incomplete improvements, except those related to stormwater and erosion control. A surety bond will not be accepted for stormwater/ erosion control work. If accepted for other incomplete improvements, at least $7,500 of the required financial guarantee must be provided in the form of a Letter of Credit, cash or a bank account.

E. **Failure to Complete Improvements** or correct deficiencies in accordance with a subdivision completion or warranty agreement and approved plans, shall be cause for the County to take enforcement action as authorized by law, and/or to draw on the funds and contract for completion of the work. In addition to direct costs to complete the work, the County may also withdraw funds to cover their administrative costs. The County shall give the property owner written notice, by first class mail, prior to taking action. The property owner shall permit the County, or its agent, access to the property to complete improvements. If the County is unable to gain access to the funds, or if costs exceed the value of the financial guarantee, the property owner will be billed for the outstanding balance.

F. **Release of Financial Guarantee.** No financial guarantee shall be released until the associated improvements have been approved in writing by the applicable agencies, the developer's design professionals and the Director. No partial releases are permitted.

B. **Other Actions**	Additional Increase in Approved Building Lots
1. Provide subdivision residents with usable access to green space or adjacent streams, lakes or public land.	5%
2. Provide the general public with usable access to green space, or adjacent streams, lakes or public land. *(Note: This option is in lieu of, not in addition to Option 1.)*	10%
3. Provide other public amenities. The Board may approve bonus lots for other actions and amenities, both on and off site, if they benefit and are desired by the public. In all such cases the value of the extra lots shall be commensurate with the cost of proposed amenities, and the bonus lots granted shall not exceed 10%. Improvements required to mitigate impacts shall not be used to earn bonus lots.	≤10%

Example: If an applicant proposes to retain 80% of their land as green space (20% lot bonus), and to allow subdivision residents access to a road along the green space (5% lot bonus), the number of building lots would be increased by 25%. To determine the total number of building lots that would be allowed, the base number of lots for the zone would be multiplied by 1.25. For a 100-acre parcel in a zone with a base density of one (1) lot per five (5.00) acres, twenty (20) lots could be approved in a standard subdivision and 25 lots could be approved in a conservation design subdivision.

SECTION 4.02 - GREEN SPACE

Green space is land with natural, cultural or historic resources of value to the community. To qualify for bonus lots, green space land that is to be preserved must be a part of the land being divided, must be unencumbered by existing conservation easements, must be in good condition (e.g. stable, in conformance with applicable best management practices), and must fall into one or more of the following categories:

A. Actively managed pasture, farm or timber land, except agricultural uses the Board deems incompatible in a residential area. Appurtenant structures are allowed, including residential structures in conformance with the *Kootenai County Zoning Ordinance*. If the green space lot will have residential structures, it must, however, be counted as one of the allowable building lots. If the proposed agricultural use requires irrigation, water rights, sufficient to support the use, must be retained with the land.

B. Wildlife habitat or wildlife corridors as identified by the Idaho Department of Fish and Game or Coeur d'Alene Tribe. These areas might include stream corridors, draws, wetlands, grassland, stands of mature timber, areas with snags, wintering areas, nesting and roosting sites, waterfront areas and travel corridors between habitat blocks and sources of food and water. *Note: Any fencing in these areas must allow for the safe movement of wildlife.*

C. Areas with native vegetation, including native grass land, or unique vegetative communities as identified by the Idaho Conservation Data Center.

D. Recreational areas, including trails and wildlife viewing areas, but excluding uses the Board deems incompatible in a residential area.

E. Historic or culturally significant areas.

F. Natural landmarks and scenic areas.

SECTION 4.05 - ADDITIONAL REQUIREMENTS FOR CONSERVATION DESIGN SUBDIVISIONS

A. To the extent possible, green space must be contiguous within the subdivision, and must be contiguous with that on adjacent properties, so as to eventually develop a network of interconnected open space.

B. Concurrent with recordation of the subdivision plat, a perpetual conservation easement meeting the requirements of Appendix D, and approved by the Director and the entities accepting the easement, must be recorded on the land that is to be conserved. Each easement will be tailored to the specific situation, and though it limits future development of the property, it does not affect the land owner's ability to sell the land or use it within the parameters of allowed green space uses and the easement. As approved by the Board, conservation easements shall be dedicated or conveyed to a land trust, a governmental body, or a conservation organization that has expertise in managing the type of green space that is proposed, and who meets the requirements of *Idaho Code* 55-2101(2). If the green space is located over the Rathdrum Aquifer, Panhandle Health District must be given an opportunity to approve and be signatory to the easement, and must be granted third party right of enforcement.

C. Prior to application for final subdivision approval, any required payments must be made to the stewardship fund of the organization that will hold the conservation easement. This payment is to cover the easement holder's yearly costs for site inspections and, if necessary, enforcement.

D. Green space lands must be actively managed by the landowner, in conformance with applicable best management practices and approved land management plans.

E. If the green space is going to be owned by a homeowners association, documents establishing the association must be approved by the Director, must meet the requirements of Appendix B, and must be recorded concurrently with the plat.

F. Conservation design subdivisions are subject to all other provisions of this Ordinance.

G. If necessary to bring the site into conformance with applicable BMP's, a land management plan must be developed and approved by the agency with jurisdiction.

SECTION 4.06 - CONSERVATION DESIGN SUBDIVISIONS WITHOUT BONUS LOTS

Conservation Design Subdivisions which conserve 20-49% of the property as green space, or which conserve property that does not fall into one of the approved green space categories are permitted, however, no bonus lots will be granted. The subdivision must follow the conservation design procedure in Section 4.04, as well as the requirements outlined in Section 4.05. Conservation of at least 20% of the property is required for all Conservation Design Subdivisions.

SECTION 4.07 - OWNERSHIP OPTIONS FOR GREEN SPACE

Green space may be owned and managed by one of the following, providing all green space is under the same ownership:

A. An individual or individuals.

B. A corporation (for profit or non-profit).

C. An incorporated homeowners or condominium association established in conformance with Appendix B. The CC&R's must state that the common green space cannot be encumbered, and that the homeowners' association is responsible for upkeep, taxes, insurance and other ownership responsibilities.

ARTICLE 5
ADMINISTRATION

SECTION 5.01 – ADMINISTRATIVE AUTHORITY AND REQUIREMENTS

The Director shall be responsible for administering this Ordinance within unincorporated Kootenai County.

A. Fees. The Director is authorized to collect fees, as approved by resolution of the Board, for services associated with subdivision development.

B. Forms. The Director is authorized to develop and require the completion of forms to aid in the administration of this Ordinance.

C. Adoption of Criteria for Supporting Documents. The Board may adopt, by resolution, criteria for supporting documents that may be necessary in the administration of this Ordinance.

D. Interpretation. In applying this Ordinance to situations that are not specifically addressed, the actions taken shall be in conformance with the purpose and intent of the Ordinance, and shall be in the best interest of the public.

E. Right to Inspect. The property owner or authorized applicant's signature on the subdivision application shall constitute approval for the Department to enter onto and inspect the subdivision property.

F. Amendments. The Board may, from time to time, amend, supplement, or repeal the provisions of this Ordinance in accordance with *Idaho Code*.

applicable fees. An affected person is defined as one having an interest in real property which may be affected by the decision. The hearing and public notice shall be conducted according to Section 2.01.C.1. of this Ordinance, and any other applicable County ordinances, and the final decision on the appeal shall be made by the Board of County Commissioners. Decisions made by the Board of County Commissioners may be appealed to the district court as provided by law.

SECTION 5.03 – ENFORCEMENT

A. **Unlawful Subdivision and Site Work.** As provided in *Idaho Code* §67-6518 and §67-6527, it shall be unlawful for any person, firm or corporation, or their agent, to knowingly and willfully participate in constructing a road, installing utilities or otherwise developing a subdivision, except in conformance with this Ordinance. In addition to the actions and penalties provided in *Idaho Code* Title 50 Chapter 13, any person, firm or corporation, or their agent, who knowingly and willfully commits, participates in, assists in or maintains a violation of this Ordinance may be subject to the following criminal and civil remedies, fines and penalties.

B. **Criminal Penalties.** As provided in *Idaho Code* §67-6518 and §67-6527, violations of this Ordinance are a misdemeanor, and upon conviction the violator(s) shall be subject to a fine of up to three hundred dollars ($300.00) and/or up to six (6) months in jail per violation, with each day of an ongoing offense considered a separate violation. In addition, if found guilty, the violator shall pay all reasonable expenses incurred in enforcing this Ordinance. In cases where multiple individuals, firms, corporations or agents participated in violating the Ordinance, they shall be held jointly and severally liable for the above payment and any restitution awarded by the Court and each person so involved, either as a principal or a co-conspirator, shall be subject to the full criminal penalties.

C. **Civil Enforcement.** The County may also take civil action in district court to prevent, restrain, correct, abate, or otherwise enforce this Ordinance. In addition to other actions that may be ordered by the court, if the County prevails, the violator shall pay to the County a sum equal to two times the monetary gain associated with the violation and shall pay all reasonable expenses incurred in enforcing this Ordinance. In cases where multiple individuals, firms, corporations or agents participated in violating this Ordinance, they shall be held jointly and severally liable for the above penalties and payments.

D. **Stop Work Order.** Whenever any terrain modification, construction, or other site work is not in compliance with this Ordinance, specific conditions of approval, or other related laws, ordinances, or requirements, the Director may order the work stopped by written notice. Such notice shall be served on any persons engaged in doing or causing such work to be done, and persons shall forthwith stop such work until authorized by the Director to proceed. Stop work orders may be appealed according to the procedure outlined in Section 5.02.

E. **Withholding of Permits.** The Director may withhold issuance of permits, including building permits, for subdivisions, lots, or parcels of land that are in violation of this Ordinance. Withholding of permits may be appealed according to the procedure outlined in Section 5.02.

F. **Processing of Applications.** Applications for approvals authorized by this Ordinance will not be accepted until all violations of County ordinances are corrected, and the property is brought into compliance. If any un-permitted site disturbance or subdivision development has previously occurred (e.g. construction of roads, driveways, building pads), a site disturbance permit must be obtained, a financial guarantee must be provided, and stormwater and erosion control systems meeting the requirements of the *Kootenai County Site Disturbance Ordinance* and applicable BMP's, must be installed and approved before an application will be accepted. These requirements may be appealed according to the procedure outlined in Section 5.02.

APPENDIX A

WILDFIRE MITIGATION PLAN REQUIREMENTS FOR MAJOR SUBDIVISIONS IN TIMBERED AREAS

Site plans showing:

- The location of draws, ridges, steep slopes and other hazardous, physical features. Slopes shall be depicted according to the following categories: 0-14%, 15-34% and ≥35%
- Aspect (north, south, east, west facing)
- The approximate location of proposed structures.
- Railroad lines.
- Existing or proposed roads that could be used for emergency ingress and egress, with the slope and width of the roads noted. Emergency access roads must meet *Zoning Ordinance* or fire district requirements for access driveways, turnarounds at the end of driveways must be at least fifty (50) feet from structures, and one pullout should be provided for every 400 feet of driveway length. Two (2) means of access to the subdivision should be provided. *Note: Turnarounds must be located away from structures so they are accessible if the structures are on fire.*
- Fuel Hazard Rating Map, broken into the following categories:
  Low Hazard – fuels consist of grass, weeds, and shrubs
  Medium Hazard – fuels consist of brush, large shrubs and small trees
  High Hazard – heavy accumulation of large fuels (timber, large brush)
- Existing or proposed fire breaks.
- The location of existing or proposed overhead power lines, propane tanks or other features that might cause or accelerate a wildfire.
- The location of hydrants and emergency sources of water.

A written report that:

- Explains features of the site that might help fire fighting efforts, such as nearby water systems or fire stations.
- Outlines how perimeter and internal fuel breaks will be designed, constructed and maintained.
- Provides short and long term plans for eliminating dangerous vegetative and fuel conditions in and around proposed building sites. Canopy cover in these areas should be less than 50%, lower branches should be pruned, the ground should be relatively free of debris, and ladder fuels and dead and dying trees must be removed. Snags that do not present a fire hazard should, however, be left standing to provide habitat for birds and wildlife.
- Verifies that power lines will be installed underground, unless underground installation is precluded by physical features of the land. If lines cannot be installed underground, the report must include an explanation of why they cannot be installed underground, and it must include plans for routine trimming of overhanging tree limbs, and for removal of ground debris below the lines.
- Confirms that there will be safe and adequate emergency access for residents and emergency personnel entering and exiting individual lots and the general area.
- Identifies sufficient and accessible emergency water supplies for fire fighting purposes. Water sources cannot be located within fifty (50) feet of a structure, must be surrounded with defensible space, and should be clearly identified with signs approved by the fire district, IDL or Kootenai County.
- Describes any modifications or appurtenances needed to allow use of water sources (e.g. pumps or hydrants). If pumps are served by above ground power lines, plans for emergency power generation may be required.

8. **Land Management Plan.** If property will be owned by the corporation, a land management plan must be provided. This plan must conform to applicable BMP's, and if bonus lots were granted, it must ensure that designated green space land will remain in conformance with Article 4 of this Ordinance.

Recommended Documents

Optional, recommended documents include separate rules and regulations governing the use of commonly owned land, shared infrastructure or improvements (e.g. a water system or recreation area).

ARTICLES OF INCORPORATION

In addition to the requirements of *Idaho Code,* articles of incorporation must include:

- The purpose and responsibilities of the corporation.
- Provisions for the membership of lot owners in the corporation.
- Authorization to levy assessments upon members, enforceable by civil action or lien upon real property to which membership rights are appurtenant.
- A statement that the corporation shall have perpetual duration and succession in its corporate name, and shall have the same powers as an individual to do all things necessary or convenient to carry out its affairs.

If specific provisions are included for managing the affairs of the corporation; for collecting assessments; or defining the powers, rights, limitations or obligations of the corporation, its board or members, those provisions must be consistent with the required elements of the by-laws and CC&R's.

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

The following are required elements of the CC&R's:

- A statement that the owner of any lot in the subdivision, by acceptance of a deed or other conveyance, is deemed to consent to membership in the corporation, and to covenant and agree to the terms and requirements of the CC&R's, which constitute a contract between the corporation and each lot owner.
- A statement that use of the services provided by the corporation is required.
- A statement that each lot owner shall pay to the corporation, assessments for the operation and maintenance of commonly owned land, shared infrastructure or improvements, together with applicable interest, late charges, attorney's fees, court and other collection costs. The CC&R's must also state that assessments and other charges are the personal obligation of the owner of each lot at the time the assessment was due, and that his or her grantee shall be jointly and severally liable for such portion thereof as may be due and payable at the time of conveyance.
- Effective methods of enforcing payment of assessments, which must include the authority to withhold service, to take civil action to recover a money judgement for unpaid assessments, and to assess, record and foreclose a lien against the real property of corporation members. Other, optional methods of enforcing payment include late fees and restrictions on voting. Individual lot owners must also have the ability to enforce the CC&R's.
- A statement that commonly owned land and improvements shall be operated and maintained in conformance with applicable best management practices and approved land management plans.
- A requirement that the Board maintain a capital replacement plan for improvements managed by the corporation, and a statement that annual assessments must be adequate to cover anticipated capital expenses. Funds collected as reserves for capital expenses must be deposited in separate accounts and held in trust.
- A statement that if the corporation, or individual lot owners, fail to operate and maintain commonly owned land, shared infrastructure or improvements in accordance with approved plans and applicable best management practices, that the County may contract for necessary operation and maintenance and bill the individual lot owners on a pro-rata basis. If it is necessary for the County to assume this responsibility, the

COOPERATIVE CORPORATION BY-LAWS

The following are required elements of the by-laws for cooperative corporations.

NAME, PRINCIPAL OFFICE AND DEFINITIONS

- Name of the corporation
- Address for the office of the corporation.
- Definition of terms.

MEMBERSHIP: MEETINGS, QUORUM, VOTING, PROXIES

- *Membership.* Membership in the corporation must be automatic and mandatory when property is purchased within the development. The by-laws must include a statement that the owner of any lot within the subdivision, by acceptance of a deed or other conveyance, is deemed to consent to membership in the corporation, to use the services furnished by the corporation, and to abide by the terms and requirements of the corporation. The by-laws should also inform members that "the patrons of a cooperative corporation, by dealing with the corporation, acknowledge that the terms and provisions of the articles of incorporation and by-laws, as well as policies, rules and regulations, shall constitute and be a contract between the corporation and each patron, and both the corporation and the patrons are bound by such contract, as fully as though each patron had individually signed a separate instrument containing such terms and provisions" (*Idaho Code* 30-3-21 (3)).
- Meetings. The place, time, and notice requirements of all regular and special membership meetings. The corporation must hold at least one (1) membership meeting each calendar year at a time and place stated in, or fixed in accordance with the by-laws. Notice and conduct of meetings must be in accordance with *Idaho Code* Title 30, Chapter 3.
- A process by which the members may call for a special meeting in accordance with *Idaho Code* Title 30, Chapter 3.
- Voting. Who is entitled to vote, how proxies are handled, what constitutes a quorum, and what majority is needed to enact resolutions, rules, amendments, and other actions.
- Conduct of membership meetings. At a minimum the president and chief financial officer must report on the activities and financial condition of the corporation, and members must be given an opportunity to consider and act upon other matters.
- Action without a meeting. Provisions for actions that can be taken without a membership meeting.

BOARD OF DIRECTORS: SELECTION, MEETINGS, POWERS and DUTIES

- Board of Directors. The number of directors, length of terms, and procedures for nomination, election, removal from office, and the filling of vacancies. The board must consist of at least three individuals.
- Board of Director meetings. For both regular and special meetings, what constitutes a quorum, and what actions can be taken by the Board with and without a formal meeting.
- Conduct of board meetings, including when meetings are required to be open and when they may be held in executive session.
- Duties of the Board of Directors. The duties of the Board must include: a) recording and retaining minutes of regular and special meetings, b) retaining a record of actions taken by members, committees or directors without a meeting, c) keeping accurate records of expenses and payments, d) maintaining the names and addresses of members and officers, along with the number of votes they are entitled to cast, e) maintaining a capital replacement plan for improvements managed by the corporation, and f) providing lot owners with information on corporation finances.
- Powers of the Board of Directors. The powers of the Board must include: a) authority and procedures for establishing budgets, adopting fees, billing and collecting assessments, borrowing money, making payments, and contracting for maintenance and repairs, b) the ability to adopt rules for governing common property and improvements, c) the ability to establish special committees to assist in management of the corporation, d) methods of enforcing the covenants, conditions, restrictions, or rules of the corporation, and e) the authority to

APPENDIX C

MINIMUM REQUIREMENTS FOR SUBDIVISION COMPLETION AND WARRANTY AGREEMENTS

- Date
- Name, mailing address and phone number of the property owner and County representative. If someone other than the property owner is providing the financial guarantee (developer, contractor), they must be included as a third party.
- Subdivision name and case number.
- General description of the subdivision location.
- Parcel number(s).
- Section, Township, Range.
- Size of subdivision in acres.
- Reference to subdivision improvements being required to meet the requirements of the Subdivision Ordinance, and be in conformance with approved plans on file with the Department (file number of plans cited).
- Cost estimate, or for warranties the actual cost of construction, for required improvements, provided by the design professionals who developed the construction plans, and referenced as Exhibit A.
- For financial guarantees in lieu of improvements, a statement that the applicant has established a financial guarantee to ensure completion of required improvements in the amount of 150% of the estimated cost, with the amount listed. (Any improvements that have not been completed and approved by the applicable agencies and design professionals must be included in the cost estimate).
- For warranties, a statement that the applicant has established a financial guarantee to ensure completion of required warranty repairs. Warranties, which are a separate financial guarantee required for all subdivisions, must cover 10% of the actual cost of all required improvements.
- Type of the guarantee, with the original attached and referenced at Exhibit B (or for cash, a copy of the check and receipt). *(Note: See the Subdivision Ordinance for the types of financial guarantees that may be accepted).*
- A completion schedule for required improvements labeled Exhibit C.
- Anticipated agency approval date for the improvements (must be at least sixty (60) days before expiration of the financial guarantee).
- For warranties on completed, approved infrastructure, the actual date of agency approval, and the deadline for completion of any warranty work. Warranties must cover a period of one (1) year after initial agency approval of improvements, and the deadline for completion of warranty work must be at least sixty (60) days before the expiration of the financial guarantee.
- A statement that this agreement is considered a contract between the parties.
- Statement that upon completion of the improvements, and written approval by applicable agencies, design professionals, and the Director, the County shall release the guarantee.
- Statement that partial releases are not permitted. *(Note: If improvements will be completed in phases, the applicant should provide separate financial guarantees with separate agreements).*
- Statement that if the required improvements are not completed and approved by the design professionals and applicable agencies prior to the above date, or within the time allowed by a written extension granted by the Director, that the County may withdraw necessary funds from the financial guarantee, hire a contractor, enter onto the property, and have the improvements completed. In addition to contracting costs, the County may also withdraw funds to cover their administrative costs, including attorney's fees.
- For warranties, a statement that any necessary repairs shall be completed in a timely manner, in accordance with deadlines established by the County or other agency with jurisdiction. If repairs are not completed and approved by applicable agencies at least sixty (60) days prior to expiration of the warranty, the County may withdraw funds adequate to pay for the repairs, along with the County's expected administrative costs.
- A statement that the County is required to give written notice, by first class mail, to the property owner and other parties to the agreement, prior to taking action to withdraw funds from the financial guarantee. Any remaining funds, after completion of improvements, shall be returned to the party that provided the financial guarantee.

APPENDIX D

MINIMUM REQUIREMENTS FOR CONSERVATION EASEMENTS

Following are items that must be included in conservation easements on green space. This is not a comprehensive list. Each easement will be different and will need to be negotiated, with legal counsel, between the parties to the easement.

IDENTIFICATION OF PARTIES AND RECITALS

- Names of grantors and grantees, including governmental bodies or conservation organizations with third party right of enforcement.
- Date.
- Statement that the grantors are the sole owners, in fee simple, of the real property, described in an attached exhibit (the legal description of the property that will be covered by the easement).
- Description of the characteristics of the property that have been identified for protection and the general purpose for the easement.
- Reference to an attached baseline inventory that establishes the condition of the property at the time of conveyance.
- Qualifications of the grantee (must be a conservation organization or public agency).
- Statement granting the easement, signed by all parties with an interest in the property.
- Statement accepting the easement, signed by all holders of the easement and all organizations with third party right of enforcement. Holders of the easement, and organizations with third party right of enforcement must meet the requirements of *Idaho Code* 55-2101(2).
- Statement that the easement is created pursuant to the Uniform Conservation Easement Act, *Idaho Code* Title 55, Chapter 21.

GRANT PROVISIONS

- Detailed statement of purposes. This section must include a statement that the land is to be preserved for one or more uses meeting the definition of "Green Space" in Article 4 of the *Kootenai County Subdivision Ordinance*.
- Requirement that the land be managed in conformance with applicable best management practices and approved land management plans.
- Rights of the grantee, including the right to protect the conservation values of the land, to inspect the property to determine compliance with the easement, and the right to enforce the terms of the easement. This section must also outline notification and inspection procedures.
- Enforcement of the easement. This section must outline enforcement procedures, specific remedies available to the grantee to correct violations of the easement, and how enforcement costs will be handled.
- Prohibited uses of the property. This must include further division of the land, any industrial or mining activities, and any uses that are inconsistent with the purposes of the easement. If the green space lot is counted as one of the allowable residential lots, in may have residential structures in conformance with County ordinances and the requirements of other agencies.
- Permitted uses of the property. Permitted uses may include any that meet the definition of "Green Space", including the construction of structures appurtenant to those uses (e.g. agricultural buildings).
- Reserved rights of the grantors.
- May include third party right of enforcement (e.g. granted to a governmental or conservation organization eligible to be a holder of a conservation easement as provided in *Idaho Code* 55-2101(2)). Conservation easements on the Rathdrum Aquifer must grant Panhandle Health District third party right of enforcement.
- The easement must be perpetual.

BOARD OF COUNTY COMMISSIONERS SIGNING

MINUTES DATE: December 29, 2004

CASE NUMBER: OA-107-03
Ordinance No. 344

CASE NAME: Subdivision Ordinance

COMMISSIONERS PRESENT:
Commissioner Currie
Commissioner Johnson

COMMISSIONERS ABSENT:
Chairman Panabaker

CONFLICT(S): None

CHANGES: The signing for S-789F-04, Wendler Park Estates 1st Addition, was pulled from the agenda and should be rescheduled for next week, January 5, 2005.

STAFF PRESENT: Rand Wichman, John Cafferty, Shireene Hale, Jill Bowes, Sandi Gilbertson

Motion by Commissioner Currie, seconded by Chairman pro tem Johnson, to approve the signing of **Case No. OA-107-03, *Kootenai County Subdivision Ordinance* (8-19-04 draft) with a number of recommended changes proposed by a citizens committee appointed by the Board of County Commissioners.**

The *Subdivision Ordinance* governs the division of land in Kootenai County, and is a new ordinance that will replace the existing Subdivision and Short Plat Ordinances. It includes general provisions; application requirements and approval procedures; design, improvement and maintenance requirements; provisions for conservation design subdivisions and bonus density; administrative procedures and requirements; fire mitigation plan requirements; minimum requirements for cooperative corporations, subdivision completion and warranty agreements and conservation easements; repeal of the existing Subdivision and Short Plat Ordinances; and an effective date.

The vote was as follows:

Commissioner Currie:	Aye	
Commissioner Johnson:	Aye	Secretary's Signature: Sandi Gilbertson
Chairman Panabaker:	Absent	Date: December 29, 2004

CERTIFICATION

I hereby certify that the attached Notice of Ordinance Adoption contains a true and complete summary of Ordinance No. 344 of Kootenai County, Idaho, and that the attached summary provides adequate notice to the public of the contents of said Ordinance.

DANIEL J. ENGLISH, CLERK

By: Deputy Clerk

APPENDIX B

Akers v. Mortensen

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HOnly the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Idaho,
Lewiston, March 2008 Term.
Dennis Lyle AKERS and Sherrie L. Akers, husband and wife, Plaintiffs-Respondents,
v.
Vernon J. MORTENSEN and Marti E. Mortensen, husband and wife, Defendants-Appellants,
andD.L. White Construction, Inc., David L. White and Michelle V. White, husband and wife, Defendants.
Dennis Lyle Akers and Sherrie L. Akers, husband and wife, Plaintiffs-Respondents,
v.
D.L. White Construction, Inc., *David L. White and* Michelle V. White, husband and wife, Defendants-Appellants,
andVernon J. Mortensen and Marti E. Mortensen, husband and wife, Defendants.
Nos. 33587, 33694.

June 4, 2008.

Background: Landowners brought action against neighbors for trespass, negligence, and to quiet title, arising from neighbors use of access road across landowners' property. Following a bench trial, the trial court awarded landowners damages and confirmed an easement across part of landowners' property. Neighbors appealed. The Supreme Court, 142 Idaho 293, 127 P.3d 196, vacated and remanded. On remand, the District Court, First Judicial District, Kootenai County, 2006 WL 2938710, John T. Mitchell, J., awarded landowners damages and confirmed easement. Neighbors appealed.

Holdings: The Supreme Court, Horton, J., held that:
(1) trial court could not rely on its personal on-site view of property to find facts relating to scope of easement;
(2) trial court's finding regarding scope of easement was not supported by substantial and competent evidence;
(3) award damages would be vacated; and
(4) the case would be assigned to a new judge upon remand.

Vacated and remanded.

[1] Appeal and Error 30 ⚿846(6)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k846 Trial by Court in General
30k846(6) k. Consideration and Effect of Findings or Failure to Make Findings. Most Cited Cases

Appeal and Error 30 ⚿1010.1(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(1) k. In General. Most Cited Cases
Review of a trial court's decision is limited to *ascertaining whether the evidence supports the* findings of fact, and whether the findings of fact support the conclusions of law.

[2] Appeal and Error 30 ⚿931(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k931 Findings of Court or Referee
30k931(1) k. In General. Most Cited

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Cases
Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, the Supreme Court will liberally construe a trial court's findings of fact in favor of the judgment entered.

[3] Appeal and Error 30 ⚿1008.1(3)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(3) k. Substituting Reviewing Court's Judgment. Most Cited Cases
On appeal, the Supreme Court will not substitute its view of the facts for that of the trial court.

[4] Appeal and Error 30 ⚿1013

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1013 k. Amount of Recovery. Most Cited Cases
The findings of a trial court on the question of damages will not be set aside when based upon substantial and competent evidence.

[5] Trial 388 ⚿375

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k375 k. View or Inspection by Judge. Most Cited Cases
Trial court could not rely upon its personal on-site view of subject property to find facts relating to scope of prescriptive easement, in landowners' action against neighbors for trespass and to quiet title, arising from neighbors' use of access road across their property.

[6] Trial 388 ⚿28(1)

388 Trial
388III Course and Conduct of Trial in General
388k28 View and Inspection
388k28(1) k. In General. Most Cited Cases
The knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial; a view of the premises is not of itself evidence upon which a verdict may be based.

[7] Trial 388 ⚿28(1)

388 Trial
388III Course and Conduct of Trial in General
388k28 View and Inspection
388k28(1) k. In General. Most Cited Cases

Trial 388 ⚿375

388 Trial
388X Trial by Court
388X(A) Hearing and Determination of Cause
388k375 k. View or Inspection by Judge. Most Cited Cases
The policy underlying the rule that a view of the premises is not of itself evidence upon which a verdict may be based is that the record must reflect the evidence upon which the finder of fact made its decision; the Supreme Court is unable to evaluate the basis of factual determinations made upon the basis of a view.

[8] Easements 141 ⚿61(9)

141 Easements
141II Extent of Right, Use, and Obstruction
141k61 Actions for Establishment and Protection of Easements
141k61(9) k. Evidence. Most Cited Cases
Trial court's finding of scope of prescriptive easement across landowners' property was not supported by substantial and competent evidence; trial court found that easement turned 90 degrees to the south immediately upon entering western parcel of landowners' property, but landowners' previous neighbor testified that easement traveled west across the parcel for at least 125 feet before curving onto his property, and aerial photograph showed a roadway resembling a shepherd's crook extending well east into the parcel before curving to the southwest, and

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scope of easement across eastern parcel was improperly based on trial court's personal view of the premises.

[9] Trespass 386 ⚿56

386 Trespass
386II Actions
386II(D) Damages
386k56 k. Exemplary Damages. Most Cited Cases
Given the Supreme Court's holding that trial court's finding regarding scope of prescriptive easement across western parcel of landowners' property was erroneous, award of punitive and compensatory damages to landowners for trespass, based on neighbors' efforts to improve the road across the parcel, would be vacated.

[10] Damages 115 ⚿57.39

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.36 Injury to Property or Property Rights
115k57.39 k. Other Particular Cases. Most Cited Cases

Trespass 386 ⚿50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and Injuries to Real Property. Most Cited Cases
Award of damages to landowners, for neighbors' alleged trespass beyond scope of prescriptive easement across eastern parcel of landowners' property and for emotional distress arising from such trespass, would be vacated, where trial court improperly based its finding regarding scope of the easement on its personal view of the premises.

[11] Appeal and Error 30 ⚿1203(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(F) Mandate and Proceedings in Lower Court
30k1203 Proceedings After Remand
30k1203(1) k. In General. Most Cited Cases
Landowners' trespass and quiet title case against neighbors, arising out of neighbors' use of easement across landowners' property, would be assigned to a new judge, upon remand for second time, given animosity between the parties and neighbors' allegations that trial judge could not act impartially.

[12] Costs 102 ⚿252

102 Costs
102X On Appeal or Error
102k252 k. Attorney's Fees on Appeal or Error. Most Cited Cases
On appeal from award of damages to landowners and confirmation of easement in neighbors, neither party was entitled to attorney fees on appeal, where landowners did not prevail but also did not frivolously defend the appeal.

Givens Pursley, LLP, Boise, for appellants Mortensen. Terri Yost argued.
Robert Covington, Hayden, for appellants White.
James Vernon & Weeks, P.A., Coeur d'Alene, for respondents. Susan Weeks argued.

HORTON, Justice.
***1** This appeal arises from a bench trial concerning an easement and trespass dispute. Vernon and Marti Mortensen, David and Michelle White, and D.L. White Construction, Inc. (hereinafter collectively referred to as "Appellants") appeal the district court's judgment regarding the existence, scope, and location of Appellants' easement across Respondents Dennis and Sherrie Akers' property and the district court's award of compensatory and punitive damages for trespass and emotional distress. This Court previously decided an appeal concerning this case in *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 127 P.3d 196 (2005) (*Akers I*). We vacate the judgment and remand the case for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

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The facts of this case are set out in detail in *Akers I.* There are four parcels of property involved in this case: "Government Lot 2," "Parcel A," "Parcel B" and the "Reynolds Property." The four parcels are rectangular and meet together at a four-way corner. Government Lot 2 is located to the northeast, and Parcel B is to the northwest. The Akers own the southwestern corner of Government Lot 2 and the southeastern corner of Parcel B. Parcel A is located to the southwest and much of Parcel A, including that adjoining Parcel B, is owned by the Whites. The Mortensens own a portion of Parcel A located to the south of that owned by the Whites. The Reynolds Property is located to the southeast and is not owned by any of the parties to this litigation. Together, the Whites and Mortensens plan to subdivide and develop their respective properties.

Government Lot 2 is bisected roughly north to south by a county road, Millsap Loop Road. Appellants hold an easement for ingress and egress to Millsap Loop Road across portions of the Akers' property. Because the properties meet at a four-way corner, Parcel A and Government Lot 2 do not actually share a border. It is therefore physically impossible to access Parcel A from Millsap Loop Road in Government Lot 2 without also passing through some other property.

The Akers acquired their real property in 1980. At the time of acquisition, a road provided access to Parcel A, running through the southern portion of Government Lot 2 and the southeastern corner of Parcel B. The access road was connected to Millsap Loop Road by an approach (the original approach) that turned sharply north from the access road, which runs east to west. The original approach was located on a blind curve in Millsap Loop Road. In order to obtain a building permit, the Akers were required to alter the entrance point of the access road where it connects to Millsap Loop Road, so that the entrance had a 30-foot line of sight in each direction of Millsap Loop Road. The Akers constructed a new approach (the curved approach), which starts to turn earlier and curves more gently to the north before meeting Millsap Loop Road. The Akers eventually quarreled with the Whites' predecessors in interest, the Peplinskis, over the Peplinskis' use of the access road, leading to the Peplinskis filing a lawsuit. The Peplinski/Akers suit ended in 1994 when the Peplinskis sold their property, including Parcel A, to the Mortensens. The Mortensens later sold much of Parcel A, including that portion adjoining Parcel B, to the Whites.

*2 In January 2002, the Akers blocked Appellants' use of the curved approach to the access road and forbade Appellants from traveling on the western end of the access road where it passes through Parcel B before connecting to Appellants' property in Parcel A. Appellants then brought in heavy equipment, including a bulldozer, to carve a route around the Akers' gate and to otherwise alter the access road. This led to a series of confrontations between the Akers and Appellants, as well as alleged damage to the Akers' property and alleged malicious behavior by Appellants.

In response, the Akers filed the instant action for trespass, quiet title, and negligence. During the trial, the district court personally viewed the access road and property in question. The district court confirmed to Appellants an express easement 12.2 feet in width across the Akers' property in Government Lot 2, through the original approach, but not the curved approach, to Millsap Loop Road. Although the district court confirmed Appellants' easement across part of the Akers' land, the court found that the easement ended at the western boundary of Government Lot 2 and did not cross into the Akers' property in Parcel B.

The district court also awarded the Akers compensatory damages arising from Appellants' trespass in the amount of $17,002.85, which was trebled pursuant to I.C. § 6-202 for a total of $51,008.55, to be paid by Appellants jointly and severally. Sherrie Akers was awarded $10,000 in compensatory damages for emotional distress, also to be paid jointly and severally by Appellants. Additionally, the district court entered punitive damage awards in favor of the Akers against the Mortensens in the amount of $150,000 and against the Whites in the amount of $30,000. Finally, the district court granted an award of costs and attorney fees to the Akers, to be paid jointly and severally by the Mortensens and Whites, in the amount of $105,534.06.

Appellants appealed from that judgment and the dispute came before this Court in *Akers I.* This Court

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remanded the case to the district court for additional fact finding and a determination regarding whether Appellants were entitled to a prescriptive easement or an easement implied from prior use. Additionally, we vacated the award of damages, costs, and attorney fees for further consideration in light of the district court's conclusions on remand regarding the scope of Appellants' easement rights.

On remand, the district court concluded that Appellants were not entitled to an implied easement from prior use because the access road was not reasonably necessary for the enjoyment of the dominant estate, Parcel A. The district court based this conclusion of law on its finding that, at the time of the severance of the dominant estate from the servient estate, there was a second road that provided access to Parcel A. The district court concluded that Appellants were entitled to a prescriptive easement across Government Lot 2, 12.2 feet in width, which was coextensive with the scope and location of the express easement. The district court also found the prescriptive easement passed from Government Lot 2 into Parcel B and immediately turned ninety degrees to the south to provide access to Parcel A. Based on these findings of fact and conclusions of law, the district court reinstated the award of damages, costs, and attorney fees from *Akers I*, and awarded the Akers their costs and attorney fees on remand. Appellants timely appealed from the district court's order on remand.

II. STANDARD OF REVIEW

*3 [1][2][3][4] Review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 488, 129 P.3d 1235, 1237 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999) (citing *Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990)). A trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006) (citing *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 856, 55 P.3d 304, 310 (2002); *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); I.R.C.P. 52(a)). If the findings of fact are based upon substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 (citing *Hunter v. Shields*, 131 Idaho 148, 151, 953 P.2d 588, 591 (1998)). This Court will not substitute its view of the facts for that of the trial court. *Ransom*, 143 Idaho at 643, 152 P.3d at 4 (citing *Bramwell*, 136 Idaho at 648, 39 P.3d at 588). The findings of the trial court on the question of damages will not be set aside when based upon substantial and competent evidence. *Trilogy Network Sys., Inc. v. Johnson*, 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007) (citing *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.*, 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983)).

III. ANALYSIS

Both sides to this appeal ask this Court to finally resolve their dispute. We are unable to fulfill their requests. We conclude that the district court's factual findings were based, in part, upon impermissible reliance on a viewing of the property. Normally, we would remand the case to the district court for additional findings of fact and conclusions of law consistent with this opinion. However, the parties have displayed a high degree of animosity towards each other and the district judge. We conclude that it is in the best interest of all parties involved, including the district judge, to vacate the judgment and remand the case for a new trial before a different district judge. Although this remedy is rarely exercised by this Court, we find it best serves the interest of justice.

A. The district court erred when making factual findings relating to the scope and location of Appellants' prescriptive easement.

[5] The district court relied upon its personal on-site view of the subject property to find certain facts relating to the scope of Appellants' prescriptive easement. This was error. Additionally, the district court's finding regarding the location of the easement on Parcel B was not supported by substantial and competent evidence.

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*4 [6][7] The district court's finding that Appellants' prescriptive easement was 12.2 feet wide was based substantially on its view of the property. The district court specifically found that: "[Appellants'] argument that the easement should be 25 feet wide is simply unsupported by the record and a view of the premises." Appellants argued that the easement should be 25 feet wide, including ditches and shoulders. The district court, however, found that: "The view and the exhibits show that not all of the length of the roadway has ditches on either or both sides, nor did the view show any consistent 'shoulders.' " We conclude that the district court's reliance on its site view was error. It is well established in Idaho that the knowledge obtained by a jury view of a premises can only be used to determine the weight and applicability of the evidence introduced at trial and that a view of the premises "is not of itself evidence upon which a verdict may be based." *Tyson Creek R.R. Co. v. Empire Mill Co.*, 31 Idaho 580, 590, 174 P. 1004, 1007 (1918). When construing a prior Idaho statute that permitted a jury to view the premises in question, this Court held: " 'The purpose of the statute is not to permit the taking of evidence out of court, but simply to permit the jury to view the place where the transaction is shown to have occurred, in order that they may the better understand the evidence which has been introduced.'" *State v. McClurg*, 50 Idaho 762, 796, 300 P. 898, 911 (1931) (quoting *State v. Main*, 37 Idaho 449, 459, 216 P. 731, 734 (1923)). Although these cases involve a viewing of the property by a jury, for purposes of appellate review, there is no analytical difference between a jury view and a court view. The policy underlying this rule of law is clear: the record must reflect the evidence upon which the finder of fact made its decision. This Court is simply unable to evaluate the basis of factual determinations made upon the basis of a view.

These rules remained intact when this Court adopted the Idaho Rules of Civil Procedure in 1958. Under I.R.C.P. 43(f), during a trial, the court may order that the court or jury may view the property that is subject to the action. This Court addressed the substantive weight afforded to a court view in *Lobdell v. State ex rel. Bd. of Highway Dir.*, a case involving an inverse condemnation. 89 Idaho 559, 407 P.2d 135 (1965). In *Lobdell*, after the judge had viewed the property in question, the district court granted an offset to the plaintiff for restoration of access to their property that had been limited by curbing constructed by the defendant. *Id.* at 563, 407 P.2d at 137. This Court held the district court erred when it entered findings based on the results of an examination of the premises and noted that an inspection of the premises is only useful to evaluate and apply the evidence submitted at trial. *Id.* at 567-68, 407 P.2d at 139-40.

Idaho is not alone in adhering to this rule: *Bd. of Educ. of Claymont Special Sch. Dist. v. 13 Acres of Land in Brandywine Hundred*, 131 A.2d 180 (Del.1957); *Dade County v. Renedo*, 147 So.2d 313 (Fla.1962); *Derrick v. Rabun County*, 107 Ga.App. 229, 129 S.E.2d 583 (Ga.1963); *State v. Simerlein*, 163 Ind.App. 657, 325 N.E.2d 503 (1975); *Guinn v. Iowa & St. L.R. Co.*, 131 Iowa 680, 109 N.W. 209 (Iowa 1906); *State v. Lee*, 103 Mont. 482, 63 P.2d 135 (1936); *State by State Highway Comm'r v. Gorga*, 54 N.J.Super. 520, 149 A.2d 266 (1959); *Myra Found. v. U.S.*, 267 F.2d 612 (8th Cir.1959) (applying North Dakota law); *In re Appropriation of Worth*, 183 N.E.2d 159 (Ohio 1962); *Port of Newport v. Haydon*, 4 Or.App. 237, 478 P.2d 445 (1970); *Durika v. Sch. Dist. of Derry Township*, 415 Pa. 480, 203 A.2d 474 (1964); *Ajootian v. Dir. of Pub. Works*, 90 R.I. 96, 155 A.2d 244 (1959) (stating rule in dicta only); *Townsend v. State*, 257 Wis. 329, 43 N.W.2d 458 (1950).

***5** [8] As previously noted, the district court found that the prescriptive easement turned ninety degrees to the south from the access road immediately upon entering Parcel B. This finding was not supported by substantial and competent evidence. The district court found that historically, the prescriptive easement "turned south on to defendants' land" and " 'disappeared' " after crossing into Parcel B. We have carefully examined the exhibits upon which both Appellants and Respondents rely, as well as those addressed by the district court in its Order on Remand. There was testimony in the record, offered by Richard Peplinski, that the prescriptive easement traveled in a western direction across Parcel B for at least 125 feet before it curved onto his property to provide access to a Quonset hut. Although the Akers claim that the evidence on this subject is conflicting, we are not so persuaded. The aerial photograph upon which the Akers rely clearly shows a roadway resembling a shepherd's crook, extending well east into Parcel B before curving back to the southwest

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toward the Quonset hut. The exhibits offered by the Respondents are similar. All exhibits are consistent with Peplinski's testimony and reveal that the access road traveled east into Parcel B before curving back towards the Quonset hut on Parcel A. For these reasons, we find this finding to be clearly erroneous.

The district court erred when it relied on its site view to find the scope of the easement and the district court's finding regarding the location of the easement on Parcel B is not based upon substantial and competent evidence. Therefore, the judgment establishing the location and scope of Appellants' easement must be vacated.

B. The district court's award of compensatory and punitive damages must be vacated.

[9][10] The district court also erred when it reinstated the damage award from *Akers I.* That damage award was based, in part, upon the district court's view of the premises. The district court awarded the Akers trespass damages resulting from Appellants' efforts to improve the road on Parcel B. These improvements consisted of excavation and the dumping of fill to provide a road base. The district court found that these activities occurred to the west of where it located Appellants' prescriptive easement on Parcel B. We have determined that the district court's factual finding as to the location of the easement on Parcel B is clearly erroneous. The district court specifically found that it had "viewed the area, and f[ound] such excavation to have occurred further to the west of where the road immediately went into what would be the exact northeast corner of what is now [Parcel A]." The damage award also compensated the Akers for Appellants' trespass outside the scope of Appellants 12.2-foot prescriptive easement across Government Lot 2. As indicated above, the district court's finding that the scope of Appellants' prescriptive easement was 12.2 feet in width was based upon the district court's view of the premises. Accordingly, the entirety of the trespass damages award must be vacated.

***6** The district court's determination of damages for emotional distress and its award of punitive damages related to conduct by Appellants in the course of that which the district court determined to be trespass. As the scope of trespass, if any, will be determined in a new trial, we vacate the entire award of compensatory and punitive damages. For the same reason, the district court's award of attorney fees and costs to the Akers is vacated.

C. This matter will be reassigned to a new district judge to conduct a new trial.

[11] Normally, we would remand the case to the district court for additional findings of fact and conclusions of law. However, given the animosity woven into this case, we find it appropriate to remand the case for assignment to a new district judge. In fairness to the district judge, and the parties as well, we think it a difficult and uncomfortable task for the district judge to now revisit and re-evaluate the evidence, disregarding his own earlier observations and factual determinations, particularly in light of allegations by Appellants that he cannot act impartially. Although such allegations rarely warrant reassignment, appellate courts in other jurisdictions have found it best to assign cases to a new trial judge in certain limited circumstances. *See* Beck v. Beck, 766 A.2d 482, 485 (Del.2001); *In re Guardianship of Lienemann*, Not Reported in N.W.2d, 2004 WL 420158 (Neb.App.2004); *In re Guardianship of R.G. and F.*, 155 N.J.Super. 186, 382 A.2d 654, 658 (1977); *In re Custody of A.L.A.P.-G.*, Not Reported in P.3d, 118 Wash.App. 1056, 2003 WL 22234910 (2003). This case is one of the rare instances in which reassignment is appropriate.

D. Neither party will receive an award of attorney fees on appeal.

[12] The Akers and the Mortensens have each requested an award of attorney fees on appeal. As the Akers have not prevailed in this appeal, they are not entitled to an award of attorney fees. We cannot conclude that the Akers have frivolously defended this appeal. Accordingly, we deny the Mortensens' request for an award of attorney fees.

IV. CONCLUSION

The judgment is vacated and this case is remanded for a new trial before a different judge. Costs to Appellants.

Chief Justice EISMANN and Justices BURDICK, J. JONES and Justice Pro Tem TROUT concur.

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